No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN HAYMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

967756—51——1

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Miscellaneous: Page

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OPINIONS BELOW

The opinions in the Court of Appeals on respondent's appeal (R. 22–43) and on the Government's petition for rehearing (R. 46–51) are reported at 187 F. 2d 456.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1950 (R. 44), and the Government's petition for rehearing was denied on February 26, 1951 (R. 45). The petition for a writ of certiorari was filed on March 28, 1951,

and certiorari was granted on May 14, 1951 (R. 52). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

28 U. S. C. 2255 requires a prisoner who wishes to test the legality of his detention under sentence of a federal court to seek relief by motion in the court which imposed the sentence, and permits an application for habeas corpus to be entertained only if the remedy by motion is "inadequate or ineffective." A motion, filed under that section by a prisoner confined outside the district in which he was sentenced, concededly raises issues of fact entitling the prisoner to a hearing at which he is present. Two questions are presented:

1. Whether, in such a case, the remedy under § 2255 is necessarily "inadequate or ineffective."

2. Whether, as applied to such a case, § 2255 violates the prohibition of Art. 1, Sec. 9, cl. 2 of the Constitution against the suspension of the privilege of the writ of habeas corpus except when, in cases of rebellion or invasion, the public safety may require it.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, Section 9, clause 2, of the Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

28 U. S. C. 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT.

Respondent was convicted in the District Court for the Southern District of California on six counts charging impersonation and forging and uttering forged endorsements on government checks (R. 2), chiefly purloined from the mail boxes of veterans and soldiers' families (R. 43). He was sentenced on January 20, 1947, to twenty years' imprisonment (R. 9–10). The judgment was affirmed by the Court of Appeals for the Ninth Circuit (163 F. 2d 1018).

On May 11, 1949, respondent, who was then confined in McNeil Island, Washington penitentiary,[1] filed a motion in the sentencing court, pursuant to 28 U. S. C. 2255, attacking the validity of his conviction (R. 1–4). He also moved for a writ of habeas corpus or other order to bring him from his place of confinement for a hearing on the motion (R. 4). In his motion, as amended June 8, 1949 (R. 5–7), he alleged three grounds in support of the relief claimed, one of which (the only one involved here)[2] was that he was deprived of the effective assistance of counsel because of a conflict of interest in that his attorney, without his knowledge and consent, also represented an accomplice who testified against him (R. 3). He requested that he be granted a new trial (R. 4).

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[1] He is now in Alcatraz penitentiary.

[2] Respondent's other claims were: (1) "that he was arrested without a warrant, and questioned for five days before he * * * was taken before a committing magistrate" (R. 2). He did not, however, assert that any confession or admission was obtained during this period or offered or received in evidence (R. 40). (2) That the first and second counts of the indictment charged the same offense (R. 5–6). But the motion (R. 2) described the first count as based on 18 U. S. C. (1946 ed.) § 78 (now § 914), which prohibits falsely personating a lawful holder of a debt of and due from the United States, and the second count as based on 18 U. S. C. (1946 ed.) § 63 (really § 73, now § 495), which prohibits falsely making, forging and counterfeiting an endorsement on a check—two totally different offenses. These averments on their face are insufficient in law to state a basis for the granting of the motion, as the court below held (R. 22, 40).

The District Court conducted an *ex parte* hearing (R. 8, 24), receiving the evidence of government witnesses, including the United States Attorney and respondent's trial counsel (R. 24). Respondent was not notified of the hearing and was neither present at the hearing nor represented by counsel (R. 8, 24). On the basis of the evidence at the hearing, the court made findings of fact and conclusions of law (R. 8–12), and denied the motion (R. 12).

The Court of Appeals reversed the order denying the motion and ordered the motion dismissed (R. 44). Three separate opinions were filed (R. 22–43). Chief Judge Denman, after expressing doubts as to the constitutionality of Section 2255, found that the motion was "inadequate and ineffective" within the meaning of Section 2255, since it afforded respondent no opportunity to prove facts outside the record. His reasoning was that respondent was entitled to be present at the hearing, yet there was no provision in Section 2255 for notifying him, and the District Court had no power to command that he be brought before it. Judge Stephens thought the section was an unconstitutional suspension of the writ of habeas corpus because it postponed an application for habeas corpus and because the judgment on the motion would be practically conclusive. Judge Pope dissented on the ground that the constitutionality of the section was not involved since respondent had not been denied

relief by habeas corpus. He also concluded that the motion, files, and record showed conclusively that respondent was entitled to no relief, and that the judge could therefore properly have denied the motion without any hearing.

The Government petitioned for a rehearing and a consideration of the case *en banc*. The petition was denied, with the same panel sitting (R. 46–51). But this time Judge Denman adopted the reasoning of Judge Stephens, and stated that Judge Stephens agreed with Judge Denman's first opinion as an alternative ground of decision. In other words, the court held that Section 2255 is an unconstitutional suspension of the privilege of the writ of habeas corpus, and, alternatively, that the motion procedure is inadequate and ineffective as to respondent. Judge Pope again dissented.

The Government, in its petition for rehearing in the court below, conceded that a factual issue was raised which required respondent's presence at a hearing, and urged that the judgment be reversed on that ground and the cause remanded for hearing (R. 46). In its petition for a writ of certiorari, the Government similarly conceded that respondent was entitled to be notified and to be present at a hearing (Pet. p. 10). The merits of the motion are, therefore, not involved here.

SUMMARY OF ARGUMENT

The Government concedes that respondent is entitled to be present at a hearing on the question of the asserted denial of the effective assistance of counsel at his criminal trial. Hence, the sole issue here is whether he should obtain that hearing by motion in the sentencing court where he asked for it and where the Government agrees that he should get it, or whether he must proceed by petition for habeas corpus in the district within which he is confined, as the court below held. Contrary to the holding below, we believe that Section 2255 affords an adequate remedy for the asserted denial, that it does not offend the constitutional prohibition against suspension of the writ of habeas corpus, and that, accordingly, the procedures which it prescribes should be followed.

I

A. Section 2255 of the Judicial Code was derived from legislation proposed by the Judicial Conference of the United States. The congressional materials shed scant light on its purposes and construction. Memoranda and reports submitted to the Judicial Conference, or submitted on behalf of the Conference to Congress, clearly show, however, that the principal objective of the draftsmen of the provision which became Section 2255 was to eliminate collateral attacks by habeas corpus on judgments of criminal con-

viction in federal courts by substituting for habeas corpus a remedy of equivalent scope in the sentencing court. This substitution was deemed particularly desirable in cases raising issues of fact outside the record, and it was expressly contemplated that the prisoner could be produced for a hearing in the sentencing court when that course seemed appropriate. It is apparent that the purpose of the draftsmen of this provision to avoid "the unseemly procedure of one district court being required to try the procedure of another district court," would be defeated by the holding of the court below that it is inapplicable in cases in which a prisoner confined outside the district in which he was sentenced raises factual issues.

B. 1. The principal basis for the court's decision that the remedy under § 2255 was inadequate lay in its view that the sentencing court was without power to bring the prisoner to the court for a hearing. But power to produce the prisoner, and to make any appropriate provisions to enable him to prepare and present his case, is implicit in the statutory scheme. It is also explicit in the provision of 28 U. S. C. 1651 authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." The traditional writs of habeas corpus *ad testificandum* and *ad prosequendum* would seem clearly adequate to serve this function. Cf. *Price* v. *Johnston*, 334 U. S. 266. The power to issue such writs to require the produc-

tion of persons confined outside the district in which the court sits has been repeatedly recognized by the courts. *Ahrens* v. *Clark*, 335 U. S. 188, on which the court below relied, was concerned solely with the power of a court to initiate a proceeding to inquire into the cause of a prisoner's detention; nothing in the decision purports to limit the power of a court which has jurisdiction of a proceeding to issue ancillary process. The language of 28 U. S. C. 2241 authorizing federal courts and judges to issue writs of habeas corpus "within their respective jurisdictions" is broad enough to include authority to issue the writ in aid of an existing jurisdiction, and the legislative history of the provision shows without doubt that the present phraseology was not intended to change the previously existing law. In fact, in proceedings under § 2255, prisoners have frequently been produced from outside the district. No court has experienced any difficulty in bringing the prisoner before it. The existence of power to produce the prisoner in such cases has never been challenged by the Department of Justice, which has custody of federal prisoners.

2. The view of the court below that § 2255 contemplates a totally inadequate hearing is also plainly without support. Under that section, a motion may be dismissed *ex parte* if the motion, together with the files and record in the case, conclusively show that the prisoner is entitled to no relief. Similarly, in habeas corpus, summary

dismissal on the face of the petition, or on the basis of "incontrovertible facts, such as those recited in a court record," is clearly proper. *Walker* v. *Johnston*, 312 U. S. 275, 284. Unless the motion can be thus summarily dismissed, the statute clearly contemplates that it shall be disposed of by an adversary proceeding. Accordingly, we agree that the district court erred in taking evidence *ex parte*. The fact that § 2255 does not in all cases require the presence of the prisoner at a hearing does not render inadequate the remedy which it affords. There may well be situations in which production of the prisoner is unnecessary and his rights can be adequately protected by appointment of counsel or other means. We do not, however, dispute that where substantial issues of fact are raised on which the testimony and credibility of the prisoner are important he should, absent special circumstances, be produced. Accordingly, we have conceded that he should be produced at a hearing in this case. Under these circumstances, we do not think it necessary—even if it were possible—to attempt to define or catalogue the situations in which it might be appropriate to proceed without producing the prisoner.

C. Even if the motion remedy were less clearly adequate than it is, we believe that orderly procedure requires that it be pursued to completion before resort to habeas corpus can be permitted. Accordingly, once the errors into which the dis-

trict court fell had been corrected by the Government's concession that respondent was entitled to be present at a hearing, the court below should have remanded the cause to the district court for hearing.

II

A. The discussions attending the adoption of Article I, § 9 of the Constitution, and the historical evils to which it was addressed, show that the purpose of the framers was to insure the availability of some remedy to persons unlawfully detained, and to limit the power to suspend that remedy to cases of rebellion or invasion in which the public safety required a suspension. Nothing in the constitutional provision or its attendant history suggests that the framers of the Constitution intended to deny to Congress the power to regulate procedure in habeas corpus, to define the grounds for issuance of the writ, and to prescribe the jurisdiction of federal courts to issue it. Congress has repeatedly exercised that power and this Court has without exception sustained its action.

B. At the time the Constitution was adopted, habeas corpus was not conceived of as a remedy available to persons convicted by a court of general criminal jurisdiction. The extension of the writ to permit collateral attacks on judgments of conviction, and the liberalization of habeas corpus procedure to provide for a determination of issues of fact outside the record of conviction, has been

a relatively recent development which rested on the language of the 1867 act. Accordingly, we think there can be no doubt that, in this area at least, Congress had power to substitute for habeas corpus a remedy of equivalent scope in the sentencing court. It was open to Congress, as to the states, to "choose the procedure it deems appropriate for the vindication of federal rights." *Young* v. *Ragen*, 337 U. S. 235, 238. And since, as is indicated by *Ahrens* v. *Clark*, 335 U. S. 188, Congress can validly restrict a prisoner's remedy to a single district court, we see no reason why it could not choose the district in which he was sentenced rather than the district in which he is confined.

C. Although we think Congress could have completely substituted the motion remedy for habeas corpus, it was careful to preserve the right to apply for habeas corpus in any case in which the motion procedure might prove "inadequate or ineffective." Thus, it has at most postponed the right to resort to habeas corpus. Even in the absence of statutory requirement, habeas corpus, as an extraordinary remedy, is generally not allowed where some other remedy is available and has not been exhausted. This rule has been applied to require exhaustion of remedies by appeal, before administrative agencies, before military tribunals, and in state courts. Its application here by legislative command cannot be deemed a suspension of the writ.

D. The provision of § 2255 that a court "shall not be required" to entertain a second motion violates no constitutional provision; it simply makes applicable the rule of *Salinger* v. *Loisel*, 265 U. S. 224, that whether to entertain a second petition for habeas corpus rests in the court's discretion.

ARGUMENT

INTRODUCTION

The Government does not dispute that the allegations of petitioner's motion were sufficient to entitle him to obtain and be present at a hearing on the question of fact as to whether he was denied the effective assistance of counsel at his trial.[3] Accordingly, the sole question here is the procedural one whether he can obtain that hearing by motion in the sentencing court where he asked for it and where the Government agrees that he should get it, or whether he must proceed by petition for habeas corpus in the district within which he is confined. The majority below held that his only remedy was habeas corpus, and ordered his present proceeding dismissed. Both Judge Denman and Judge Stephens held or assumed that a proceeding by motion in the sentencing court, brought by one confined outside the district in which he was sentenced, is *necessarily* inadequate to afford relief in any case in-

[3] The Government so conceded in its petition for rehearing in the Court of Appeals (see R. 46) and in its petition for certiorari (Pet. 10).

volving issues of fact outside the original trial record. From this premise they drew two alternative conclusions, (a) that whenever issues of fact are thus presented, Section 2255 of the Judicial Code is by its terms inapplicable, and (b) that, at least as to such cases, the provision of Section 2255 restricting the power of courts to entertain petitions for habeas corpus is unconstitutional. This holding is contrary to the decisions of every other court which has been faced with a similar problem; most courts of appeals and many district courts have held, assumed or stated that § 2255 provided both a constitutional and an adequate remedy for persons confined outside the district of trial.[4]

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[4] The 5th and 10th Circuits have expressly held Sec. 2255 constitutional. *Martin* v. *Hiatt*, 174 F. 2d 350 (C. A. 5); *Barrett* v. *Hunter*, 180 F. 2d 510 (C. A. 10), certiorari denied, 340 U. S. 897. See also *Wong* v. *Vogel*, 80 F. Supp. 723 (E. D. Ky.); *St. Clair* v. *Hiatt*, 83 F. Supp. 585 (N. D. Ga.), affirmed, 177 F. 2d 374 (C. A. 5), certiorari denied, 339 U. S. 967. The 5th, 6th, 8th and 10th Circuits have held that resort to Sec. 2255 is a prerequisite to seeking habeas corpus: *Cline* v. *Hiatt*, 174 F. 2d 822 (C. A. 5); *Tacoma* v. *Hiatt*, 184 F. 2d 569 (C. A. 5), certiorari denied, 340 U. S. 955; *Curran* v. *Shuttleworth*, 180 F. 2d 780 (C. A. 6); *Donnelly* v. *Steele*, 180 F. 2d 1019 (C. A. 8); *Armstrong* v. *Steele*, 181 F. 2d 763 (C. A. 8); *Pinkerton* v. *Steele*, 181 F. 2d 536 (C. A. 8); *Weber* v. *Steele*, 185 F. 2d 799 (C. A. 8); *Hallowell* v. *Hunter*, 186 F. 2d 873 (C. A. 10); *Brown* v. *Hunter*, 187 F. 2d 543 (C. A. 10); *Barnes* v. *Hunter*, 188 F. 2d 86 (C. A. 10). See also *Clark* v. *Memolo*, 174 F. 2d 978, 982 (C. A. D. C.); *Davis* v. *Humphrey*, 80 F. Supp. 513 (M. D. Pa.); *Gebhart* v. *Hunter*, 89 F. Supp. 336 (D. Kans.), affirmed, 184 F. 2d 644 (C. A. 10); *Hart* v. *Hunter*, 89 F. Supp. 153 (D. Kans.); *Lowe* v. *Humphrey*,

In our view, the premise on which both aspects of the court's decision rests is plainly erroneous. We believe that the procedure by motion in the sentencing court, prescribed by Section 2255, was clearly intended to be the exclusive procedure in cases presenting factual issues as in other cases, subject only to rare exceptions, and that it affords opportunity for a full hearing in the sentencing court whenever the motion raises issues calling for such a hearing. If we are correct in this view of the purpose and effect of Section 2255, we think it follows that the asserted constitutional issues are without substance. Accordingly, we shall discuss, first, the construction and effect of Section 2255, and, second, the constitutional issues.

I

THE COURT BELOW ERRED IN HOLDING THAT THE PRESENT PROCEEDING BY MOTION IN THE SENTENCING COURT WILL BE INADEQUATE TO TEST RESPONDENT'S ASSERTIONS THAT HE WAS CONVICTED IN VIOLATION OF CONSTITUTIONAL RIGHTS

A. THE PURPOSE OF SECTION 2255 WAS TO ELIMINATE COLLATERAL ATTACKS BY HABEAS CORPUS ON CRIMI-

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80 F. Supp. 442 (M. D. Pa.), certiorari denied, 337 U. S. 944, 339 U. S. 988; *Robinson* v. *Swope*, 96 F. Supp. 98 (N. D. Cal.). All of the circuits have given effect to Sec. 2255. In addition to cases in circuits mentioned above, see *Carvell* v. United States, 173 F. 2d 348 (C. A. 4); *Mercado* v. *United States*, 183 F. 2d 486 (C. A. 1); *United States* v. *Tacoma*, 176 F. 2d 242 (C. A. 2); *United States* v. *Gallagher*, 183 F. 2d 342 (C. A. 3), certiorari denied, 340 U. S. 913; *United States* v. *Sturm*, 180 F. 2d 413 (C. A. 7), certiorari denied, 339 U. S. 986; *Hastings* v. *United States*, 184 F. 2d 939 (C. A. 9); *Adelman* v. *United States*, 174 F. 2d 283 (C. A. 9).

NAL JUDGMENTS BY SUBSTITUTING AN EQUIVALENT REMEDY BY MOTION IN SENTENCING COURT

Section 2255 was enacted on June 25, 1948, as part of the revision of the Judicial Code. The congressional materials shed scant light on its purposes and construction. H. Rept. 308, 80th Cong., 1st Sess., p. 7, states merely that "The habeas corpus chapter has been written to conform with legislation pending in Congress and approved by the Judicial Conference of the United States (see H. R. 4232, 4233, and S. 1451, 1452, 79th Cong.)." See also S. Rept. 1559, 80th Cong., 2d Sess., pp. 8–10.

The section, together with a number of the related provisions of Sections 2241–2254, was, however, the outgrowth of recommendations of the Judicial Conference,[5] which were embodied in bills drafted and approved by the Conference and introduced at the Seventy-ninth Congress. (H. R. 4232, 4233; S. 1451, 1452. See also H. R. 6723.) Both the House Report and the Reviser's Notes expressly referred to those bills as the source for the present provisions of Section 2255 and related sections of the Judicial Code.[6] Under these cir-

[5] The Judicial Conference, created by the Act of September 14, 1922, 42 Stat. 838, 28 U. S. C. 331, consists of the Chief Justice of the United States and the Chief Judge of each judicial circuit.

[6] See Reviser's Notes to Sections 2244–2250, 2255. The note to Section 2255 states "[This section] has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H. R. 4233, Seventy-ninth Congress." 28 U. S. C. following Section 2255.

cumstances, the records of the Judicial Conference, which contain the only extended authoritative discussions of the purpose and effect of the proposed bills, are a valuable guide to the construction of the present Judicial Code provisions.[7]

The Court has given weight to the explanation of a bill by those responsible for its preparation and submission to Congress. *United States* v. *American Trucking Associations*, 310 U. S. 534, 547–551; cf. *Shapiro* v. *United States*, 335 U. S. 1, 11–12. The statements of the Judicial Conference, whose recommendations Congress accepted without debate or dissent, would seem to be of considerably greater significance in dealing with legislation of this sort.

The Judicial Conference proposals were the fruits of extended consideration by the Conference. At the September 1942 meeting of the Conference a committee "to study the entire subject of procedure on applications for habeas corpus" was appointed, consisting of Circuit Judges Parker, Stone and Albert Lee Stephens, and District Judges Underwood, Vaught, and Wyzanski. Annual Report, Judicial Conference, 1942,

[7] The conference records consist of the printed reports of sessions of the Conference and of memoranda prepared by a committee of the Conference or by the Administrative Office of the United States Courts and submitted to the Conference, to all district and circuit judges or to members of Congress in explanation of the proposed bills. These memoranda are available in the files of the Administrative Office; for the convenience of the Court we have printed them as an appendix to this brief, *infra*, pp. 87–187.

p. 18. That committee submitted, at the September 1943 session of the Conference, a report and supplemental report and a draft of two proposed bills (Appendix, pp. 87–104, *infra*). These bills, as amended and approved by the Conference, consisted of (1) a "jurisdictional bill", Section 1 of which related to habeas corpus applications by state prisoners, and Section 2 of which was the predecessor of the present Section 2255, and (2) a "procedural bill" which was the predecessor of the present Sections 2244–2250. Annual Report, 1943, pp. 22–4. At subsequent meetings the Conference renewed its approval of these bills (Annual Reports, 1944, p. 22; 1945, p. 28).

The conference bills were transmitted to the ~~Chairmen of the House and Senate Judiciary Committees~~ Congress and were introduced as H. R. 4232, 4233, S. 1451, 1452, in October 1945. A substitute for the "jurisdictional bill", which had also received informal Conference approval, was introduced at the same Congress as H. R. 6723. (See Appendix, pp. 122–123, *infra*).[8] At a special session in April 1947, the Conference committee submitted a further report (Appendix, p. 144, *infra*) renew-

[8] H. R. 6723 differed from H. R. 4233 in (a) omitting a provision (not included in the Judicial Code) for a three-judge court to try habeas corpus applications by state prisoners and (b) including a provision (not included in the Judicial Code) limiting the time within which a motion to vacate could be filed by a federal prisoner.

ing its approval of H. R. 4232 and 4233, expressing disapproval of H. R. 6723, and proposing certain additional amendments to both bills. Pursuant to directions of the Conference (Report of Special Session, April 1947, p. 46), copies of the three bills, with an accompanying memorandum by Judge Parker (Appendix, pp. 159–182, *infra*), were distributed to all district and circuit judges for comment.

Meanwhile, a problem had arisen by reason of the fact that the House Committee on Revision of Laws was engaged in revising the Judicial Code, including the provisions relating to habeas corpus. The chairman of that committee was informed in 1946 of the Conference proposals and of the desirability of avoiding conflict between those proposals and the pending revision. (See Appendix, p. 124, *infra;* see also Annual Report 1945, p. 26.) At the September 1947 session of the Conference, the habeas corpus committee filed a further report (Appendix, p. 182, *infra*) which pointed out that the Judicial Code, as passed by the House, "incorporates most of the provisions contained in the proposals considered by the Conference and the judiciary" and recommended that the Conference abandon further consideration of the bills which it had proposed, and press instead for adoption of Chapter 153 of the proposed Judicial Code (embodying the present Sections 2241–2255). This

recommendation was adopted. (Annual Report, 1947, p. 17.)[9]

The various reports and memoranda submitted in connection with the consideration of these proposals by the Conference show beyond question that the committee which drafted the provision which became Section 2255, and the Conference which approved it, understood that its effect was to authorize a remedy in the sentencing court substantially equivalent to habeas corpus,[10] to make that remedy the ordinary means of relief for federal prisoners, and to preclude relief by habeas corpus except in rare cases. They indicate, moreover, that it was precisely in cases presenting issues of fact outside the record that this substitution of the motion procedure was deemed particularly desirable. And, while the procedures to be followed under the motion remedy are not discussed in detail, all of the reports and discussions are clearly premised on the view that that remedy would afford an opportunity for hearing and de-

[9] The Conference proposed certain amendments to Sections 2244 and 2254, which were adopted by the Congress. See S. Rept. No. 1559, 80th Cong., 2d Sess., pp. 8–10.

[10] As the Reviser's Notes point out, this remedy was in the nature of the old writ of error *coram nobis*. Whether that remedy was available in federal courts, and the extent to which equivalent relief could be had by motion, was a matter of very considerable doubt prior to the adoption of Section 2255. Compare, e. g., *Robinson* v. *Johnston*, 118 F. 2d 998, 1000 (C. A. 9), reversed, 316 U. S. 649, with *Murrey* v. *United States*, 138 F. 2d 94, 96 (C. A. 8).

termination of factual issues which would be an adequate and effective substitute for the procedural rights available on habeas corpus.

The first report of the habeas corpus committee, submitted to the Conference in 1943 (Appendix, p. 87, *infra*) emphasizes the special concern of that committee with cases presenting issues of fact outside the record. It states (p. 88, *infra*):

> The present procedure in habeas corpus was adequate so long as the court hearing the application was held bound by the record made on the trial of a prisoner theretofore convicted in a state or federal court, not only with respect to questions raised on the trial but also with respect to questions that might have been raised, so that matters dehors the record could be considered only to a very limited extent as affecting the validity of the trial.

After referring to recent decisions expanding the scope of habeas corpus and permitting consideration of facts outside the record, the report continues (pp. 90–91, *infra*):

> Where petitioner is imprisoned under the judgment of a state or federal court, and the conviction is attacked as void on the ground that constitutional rights have been denied on the trial, it necessarily results that the court hearing the application for habeas corpus must review the proceedings of the trial court on matters very largely dehors the record. Under

the present practice, no provision is made for the trial judge to supplement the record or even for him to furnish a statement as to what occurred on the trial. On the contrary, if heard at all with respect to the matter, he must be heard as an ordinary witness. *Walker* v. *Johnston,* 312 U. S. 275. This has resulted, in one case at least, in the trial judge of a state court appearing as a witness in a habeas corpus proceeding in a federal court and testifying in defense of the proceedings had in his court. *Mitchell* v. *Youell,* 4 Cir. 130 F. 2d 880. Since state remedies must have been exhausted as a prerequisite to application for the writ, it results in many cases that the federal District Court is reviewing on habeas corpus the constitutional validity of a judgment which has been affirmed on appeal by the highest court of a state, and frequently with respect to matters which have been fully considered on that appeal. It is unnecessary to comment on the real danger involved in a procedure which leads so readily to conflict between the state and federal jurisdictions.

While the practice of having criminal proceedings in one federal District Court reviewed and their validity determined in habeas corpus proceedings by another District Court is not open to the same objections as where a conflict between state and federal jurisdictions may arise, it is the opinion of three of the members of

> the Committee that this is an abuse which should be corrected, and that the question as to the constitutional validity of the trial should be raised in the trial court on motion in the nature of the old writ of error coram nobis, and that habeas corpus in another court to raise such question should not be allowed except in those rare cases where the ends of justice imperatively so require.

As the report subsequently indicates, the Committee was unanimous in recommending adoption of a provision authorizing application for relief by motion in the sentencing court. Judges Stephens, Underwood and Wyzanski were recorded as objecting to any provision that the availability of such a procedure should restrict a prisoner's right to apply for habeas corpus. The Conference, however, approved the inclusion of such a provision. Annual Report, 1943, pp. 22–24. (For the text of the provision approved see *infra*, p. 26). In subsequent reports of the Committee, Judges Stephens, Underwood and Wyzanski did not renew their objections to this aspect of the bill. See Appendix, pp. 144–186, *infra*.[11]

[11] In the 1947 report, the same three judges did object to a provision in the "procedural bill" that no judge or court "shall entertain" a habeas corpus petition which presents no grounds for relief "not theretofore presented and determined" (see Appendix, pp. 154–159, *infra*). Subsequently, the Committee unanimously approved a provision that no judge or court "shall be required to" entertain a habeas corpus petition presenting no new ground if the judge or court is

Substantially, the same view of the purpose and effect of the proposed provision was reiterated in subsequent reports of the Committee.[12] Thus, the report of the habeas corpus committee in 1947 states (Appendix, pp. 147–148, *infra*):

> Your Committee deems it unnecessary to repeat what has already been said with respect to the desirability of the enactment of legislation embodying the second section of the act, the purpose of which is to require that attacks by a prisoner upon a judgment under which he is held in custody, be made if possible, in the sentencing court and not in the court of the district where he is imprisoned, so as to avoid the unseemly procedure of one district court's being required to try the procedure of another district court upon the mere application of one who has been convicted of crime by the latter.

A memorandum submitted in 1945 by Circuit Judge Stone, acting for the Committee, to the chairmen of the House and Senate Judiciary committees in explanation of the bills proposed by the Conference (which had then been introduced) reflects a similar view and described the pro-

"satisfied that the ends of justice will not be served" by further requiring the detention (Appendix pp. 183–185, *infra*). In that form, the provision became 28 U. S. C. 2244.

[12] A memorandum by Judge Parker accompanying the transmittal of the bills to all district and circuit judges in 1947 repeats almost verbatim the statements quoted from the 1943 report, omitting, however, any reference to any disagreement within the committee (see p. 24, *supra*).

posed motion remedy as "intended to be as broad as habeas corpus." (Appendix, p. 137, *infra*.)

The bill approved by the Judicial Conference contained a provision, comparable to, but worded somewhat differently from, the last paragraph of Section 2255, which would have precluded the courts from entertaining a habeas corpus petition by one eligible to apply for relief by motion

> unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons.[13]

Standing by itself the phraseology of this provision might perhaps be taken to suggest an understanding that use of the motion remedy would frequently or typically be impracticable in cases presenting factual issues because of the inability of a prisoner confined outside the district to be present at such cases. It might also suggest some degree of judicial discretion to assess the relative convenience of the two procedures and choose the more convenient. The statements submitted to

[13] The quoted language is taken from the bill as presented to and introduced in Congress (see Appendix, *infra*, pp. 117, 176). It differs from the wording set out in the 1943 Conference report, the final phrase of which had read "because of the necessity of his presence at the hearing * * *" (Annual Report, 1943, p. 24). The change in phraseology from "necessity" to "inability" was presumably made by a committee on style appointed by the Conference (Annual Report, 1943, p. 22).

Congress on behalf of the Conference clearly show, however, that even under the relatively flexible phraseology approved by the Conference it was contemplated that the motion procedure would be the normal remedy and habeas corpus the exceptional one, in factual cases as in other cases. The memorandum submitted by Circuit Judge Stone to the chairmen of the congressional committees in explanation of the bills is explicit as to this. It states (Appendix, pp. 139–140, *infra*):

> Most habeas corpus cases raise fact issues involving the trial occurrences or the alleged actions of judges, United States attorneys, marshals or other court officials. Obviously, it involves interruption of judicial duties if the trial judge, the United States attorney, the court clerk or the marshal (one or all of them) are required to attend the habeas corpus hearing as witnesses. Such attendance is sometimes necessary to refute particular testimony which the prisoner may give and, obviously, such attendance is the safest course. This is so because experience has demonstrated that often petitioner will testify to anything he may think useful, however false; and, without the witness present to refute such, he is encouraged to do so and may make out a case for discharge from merited punishment. Some realization of the possible extent of this burden on Court officials may be gained from the bare statement that, while convictions occur in all of

the Districts throughout the country, federal prisoners are confined in a very small number of penal institutions; and habeas corpus must now be brought in the District where the petitioner is confined. Even if the testimony of these officials is taken by deposition, the interference and interruption is merely lessened in degree and the above danger is risked.

The main disadvantages of the motion remedy are as follows: The risk during or the expense of transporting the prisoner to the District where he was convicted; and the incentive file baseless motions in order to have a "joy ride" away from the prison at Government expense.

Balancing these, as well as less important, considerations, the Conference is of opinion that the advantages outweigh and that the motion remedy is preferable. As to the risk (escape or delivery) while transporting the prisoner to the District of conviction, the difference is only one of degree—of distance and, therefore, of opportunity. As to the expense, it is highly probable that it would be more expensive for the Government witnesses to go from the District where sentence was imposed and return than for the prisoner to be brought to such District and returned. As to the incentive to file petitions, the difference is between a longer and a shorter trip to the Court. It is thought that the provision in Section 2 providing for habeas corpus (in the District of confinement)

> where it is not "practicable to determine his rights * * * on such a motion" will furnish a sufficient discretion in the judge or court before whom habeas corpus is filed to evaluate and defeat the above "disadvantages" to a large degree."

This discussion of the relative advantages and disadvantages of transporting the prisoner to the District of conviction would have been meaningless if it had been thought that the reference to the prisoner's "inability to be present at the hearing" meant that no prisoner confined outside the District of trial could ever be brought to a hearing, or that the "where not practicable" proviso would apply to every case involving factual questions when the prisoner was so confined. The use of "practicable" suggests that the Conference was thinking of practical, not legal, impediments to the prisoner's presence. The kind of case which the proviso was intended to reach is illustrated in a memorandum submitted by Director Chandler of the Administrative Office to accompany the transmittal of the bills to Congress in 1944, which stated: "Such an instance might occur where a

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[14] Judge Stone's suggestion of judicial discretion in the habeas corpus court to apply principles analogous to the doctrine of *forum non conveniens*, while a permissible reading of the Conference bill, would clearly appear inapplicable to the provisions of Section 2255. Section 2255 requires application to be made to the trial court, except where that remedy would be "inadequate or ineffective," not merely inconvenient.

dangerous prisoner, who had been convicted in the Southern District of New York, was confined in Alcatraz Penitentiary." (Appendix, p. 113, *infra*.)

The statutory provision was given its present form by the House Revisers, whose draft was approved by the Judicial Conference (Annual Report, 1947, pp. 17–18). No explanation was given for the change in language by which the clause "unless it also appears that the remedy by motion is inadequate or ineffective" replaced the "where not practicable" proviso. The more general language substituted would certainly negative any possible intimation that the new motion procedure would be generally unavailable to prisoners confined outside the District. Doubtless the case of the prisoner too dangerous to transport could be handled in the same way; if the judge to whom the motion was presented concluded that the public interest made it undesirable or unsafe to bring him far from the prison and that the prisoner's presence was indispensable to a fair hearing,[15] the effect would be to remit the prisoner to the institution of a habeas corpus proceeding where he was confined.

The reports and memoranda of the Judicial Conference do not discuss in detail the procedural aspects of the proposed motion in the sentencing

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[15] As to the possibility of taking the prisoner's testimony by deposition or affidavit, see *infra* pp. 55–58. Needless to say, the prisoner himself cannot be the judge of whether he is too dangerous to be transported to the District of trial.

court or the scope of the hearing intended to be afforded. What has been set forth above clearly indicates, however, that it was contemplated that, where appropriate, the prisoner would be brought to the sentencing court for hearing. Moreover, the whole tenor of the reports reflects an intention that the motion procedure be a complete substitute for habeas corpus, and that it be effective to afford the prisoner opportunity to present his contentions and have them adjudicated. The provision preserving the habeas corpus remedy where relief by motion was impracticable was included to avoid any possible injustice.[16] But it was contemplated that the motion remedy would ordinarily prove adequate and that resort to habeas corpus would occur only in rare cases. Only on this view would the proposal be effective to achieve its proponents' major purpose of eliminating collateral attack by a different district court. That purpose would be utterly defeated by the holding of the court below that, whenever issues of fact are raised by prisoners confined outside the district, the motion procedure is necessarily inadequate and habeas corpus is the sole remedy. Such a reading would render Section 2255 a nullity in the very cases in which the need for it was deemed most acute by the Conference.

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[16] Compare Judge Parker's statement that "the power to grant relief under habeas corpus where injustice would otherwise result is carefully preserved" (Appendix, p. 172, *infra*).

B. SECTION 2255 AUTHORIZES A REMEDY IN THE SENTENCING COURT WHICH, IN CASES PRESENTING FACTUAL ISSUES AS IN OTHER CASES, IS FULLY ADEQUATE AND EFFECTIVE TO AFFORD ANY RELIEF TO WHICH THE PRISONER IS ENTITLED

The court below did not dispute that the scope of the attack which could be made under Section 2255 on a prior judgment of conviction is coextensive with that available on habeas corpus. We think there can be no doubt as to this; Section 2255 authorizes the granting of appropriate relief whenever the sentence is "subject to collateral attack." The grounds for the motion thus "encompass all of the grounds that might be set up in an application for a writ of habeas corpus predicated on facts that existed at or prior to the time of the imposition of sentence." *Barrett* v. *Hunter*, 180 F. 2d 510, 514 (C. A. 10), certiorari denied, 340 U. S. 897.[17] Nor did it deny that the scope of relief authorized was fully adequate to do justice. This, also, is clear on the face of the statute; the court is authorized to "discharge the prisoner or resentence him or grant a new trial or correct the sentence

[17] Accord: *United States* v. *Wight*, 176 F. 2d 376 (C. A. 2); *United States* v. *Gallagher*, 183 F. 2d 342 (C. A. 3), certiorari denied, 340 U. S. 913; *Birtch* v. *United States*, 173 F. 2d 316 (C. A. 4), certiorari denied, 337 U. S. 944; *Hudspeth* v. *United States*, 183 F. 2d 68 (C. A. 6), certiorari denied, 341 U. S. 942; *Keto* v. *United States*, 189 F. 2d 247 (C. A. 8); *Hastings* v. *United States*, 184 F. 2d 939 (C. A. 9); *Hahn* v. *United States*, 178 F. 2d 11 (C. A. 10); *Smith* v. *United States*, 187 F. 2d 192 (C. A. D. C.), certiorari denied, 341 U. S. 927.

as may appear appropriate."[18] It rested its decision that Section 2255 was inadequate and ineffective on its view that that section made inadequate provision for hearing and determination of issues of fact. We think that examination of the provisions of Section 2255 and the practice under the section disclose that the position of the court below is entirely without merit.

1. *Power of the sentencing court to order the prisoner produced for hearing.*—The principal basis for the majority's decision appears to have been that where the prisoner was confined outside the district the sentencing court was without power to bring him before the court for hearing. Section 2255 plainly contemplates, however, that the prisoner may be produced before the court. The provision that "a court *may* entertain and determine such motion without requiring the production of the prisoner at the hearing" (italics added) reflects an understanding that the court may also require the production of the prisoner, where that course is necessary or appropriate to the determination of the motion or the granting of adequate and effective relief.[19] As we have

[18] Under the habeas corpus statute, which authorized the court to "dispose of the party as law and justice require" (R. S. 761, 28 U. S. C. (1946 ed.) 461), the courts had devised procedures by which, where outright release was not appropriate, the prisoner was transmitted to the sentencing court for re-sentencing or other further proceedings. *In re Bonner*, 151 U. S. 242; *Wilson* v. *Bell*, 137 F. 2d 116 (C. A. 6); *De Benque* v. *United States*, 85 F. 2d 202 (C. A. D. C.).

[19] The further provision that where appropriate the pris-

seen, the records of the Judicial Conference (supra, pp. 16–31) show beyond question that the judges who drafted and approved the original proposal which became Section 2255 clearly contemplated that under it prisoners would be brought from outside the district when their presence in the sentencing court was necessary or appropriate.

Accordingly, we think no further grant of authority to produce the prisoner is needed. As Judge Pope said below, "It is simply a matter of common sense that a court required to do a job may make the necessary orders to accomplish it" (R. 51). The power to require the prisoner's presence is thus clearly implied from Section 2255 itself.

Any question as to the existence of such authority is removed, however, by the "all writs" statute, 28 U. S. C. 1651, which authorizes federal courts to "issue all writs necessary or appropriate[20] in aid of their respective jurisdictions agreeable to the usages and principles of law." That section authorizes writs of habeas corpus in aid of an existing jurisdiction. *Whitney* v. *Dick*,

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oner may be resentenced or retried also indicates that it was assumed that the prisoner could be brought back to the district of trial. The general practice prior to the enactment of Section 2255 was to have the prisoner produced in court for resentencing. See, e. g., *De Benque* v. *United States*, 85 F. 1202 (C. A. D. C.); *Wilson* v. *Bell*, 137 F. 2d 716 (C. A. 6); *McDonald* v. *Moinet*, 139 F. 2d 939 (C. A. 6).

[20] The words "or appropriate" were added in the 1948 revision.

202 U. S. 132, 136; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 272–274; *Price* v. *Johnston*, 334 U. S. 266. It has been held sufficiently broad to empower a circuit court of appeals to issue a writ "in the nature of a writ of habeas corpus" to bring a prisoner before the court to argue his appeal. *Price* v. *Johnston*, 334 U. S. 266, 279. In that case this Court held that such a writ could be issued, "where its use is calculated, in the sound judgment of the [court], to achieve the ends of justice entrusted to it" (334 U. S. at 279). The fact that none of the common law writs of habeas corpus had been devised for the particular purpose of producing a prisoner to argue his case was deemed irrelevant; the "all writs" section was held to be not "an ossification of the practice and procedure of more than a century and a half ago," but rather "a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law'" (334 U. S. at 282). Moreover, the Court emphasized that "the historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause" (343 U. S. at 283). These principles, which permitted use of a writ in the nature of habeas corpus for the novel purpose of bringing a prisoner before an appellate court to argue his appeal, clearly support its use under Section 2255 for the familiar purpose of bringing a

prisoner before a trial court as a witness or a party.

This purpose would seem to be precisely fulfilled by the traditional writs *ad testificandum* and *ad prosequendum*, described by Blackstone (3 Bl. Comm. 129), and by this Court as early as 1807 (*Ex parte Bollman*, 4 Cranch 75, 97–98) and as recently as 1948 (*Price* v. *Johnston*, 334 U. S. 266, 281). In the *Price* case the Court referred to Blackstone's description of the common law writ as including

> (3) *Habeas corpus ad prosequendum, testificandum, deliberandum, etc.*—Issued "when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

It is unnecessary, however, to consider whether those common law forms of the writ are exactly adapted for use under Section 2255 (Compare R. 97). "Justice may on occasion require the use of a variation or a modification of an established writ" (*Price* v. *Johnston, supra*, 283–284).

The majority below thought, however, that such a writ would not lie to reach a prisoner confined outside the district in which the court sits. Nothing in the "all writs" section or in *Price* v. *Johnston, supra*, contains any suggestion of such a limitation. In a great many cases, the courts have either issued the writ to bring prisoners confined outside the district before the court as

witnesses or, assuming the power to do so, denied the writ in the exercise of their discretion. See *Gibson* v. *United States,* 53 F. 2d 721 (C. A. 8), certiorari denied, 285 U. S. 557; *United States* v. *Hunter,* 162 F. 2d 644, 646, 649 (C. A. 7); *Sanders* v. *Brady,* 57 F. Supp. 87, 89 (D. Md.); *Bugg* v. *United States,* 140 F. 2d 848 (C. A. 8), certiorari denied, 323 U. S. 673; *Murrey* v. *United States,* 138 F. 2d 94 (C. A. 8); *Gilmore* v. *United States,* 129 F. 2d 199 (C. A. 10), certiorari denied, 317 U. S. 631; *Neufield* v. *United States,* 118 F. 2d 375, 385 (C. A. D. C.), certiorari denied, 315 U. S. 798; *In re Thaw,* 166 Fed. 71 (C. A. 3); *United States* v. *Sehon Chinn,* 74 F. Supp. 189 (S. D. W. Va.), affirmed, 163 F. 2d 876 (C. A. 4). In the *Sanders* case, Judge Chesnut stated (57 F. Supp., at 89) that—

> This writ can issue in proper cases by the judge in any district in the United States to bring before him any federal prisoner confined in any one of the numerous federal penal institutions in the country.

In the *Gibson* case, the Court of Appeals for the Eighth Circuit observed that the district court's power to issue subpoenas in criminal cases was not limited to the district, and concluded that the power to issue the writ *ad testificandum*—another means of obtaining the presence of a witness—must be equally broad.

Similarly, the writ *ad prosequendum* has often been used to produce for trial a prisoner confined

outside the district. *Downey* v. *United States*, 91 F. 2d 223 (C. A. D. C.); *Noble* v. *Botkin*, 153 F. 2d 228 (C. A. D. C.); *Pelley* v. *Matthews*, 163 F. 2d 700 (C. A. D. C.), certiorari denied, 332 U. S. 811. Cf. *Ponzi* v. *Fessenden*, 258 U. S. 254; *Ex parte Lamar*, 274 Fed. 160 (C. A. 2), affirmed, 260 U. S. 711; *United States* v. *Coles*, 88 F. Supp. 150 (D. Ore.). *Contra: Phillips* v. *Hiatt*, 83 F. Supp. 935 (D. Del.).

The language of 28 U. S. C. 2241, and this Court's decision in *Ahrens* v. *Clark*, 335 U. S. 188, do not require a contrary result. In relying on these authorities the majority below wholly ignored the fundamental distinction between process which initiates an action and process ancillary to an existing proceeding over which the court has jurisdiction. See *Whitney* v. *Dick*, *supra*. Section 2241 empowers federal courts and judges to issue writs of habeas corpus "within their respective jurisdictions." Where a court does not otherwise have jurisdiction of the party or subject matter, this provision, as was held in *Ahrens* v. *Clark*, *supra*, imposes a territorial limitation on the power to issue the writ. In a proceeding to inquire into the cause of a prisoner's detention, only a court within whose district the prisoner is confined may use the writ to acquire jurisdiction over the prisoner and the warden. But on the face of Section 2241, it would seem clear that where a court already has jurisdiction of an existing cause of action, it is "within" its jurisdiction

to issue the writ as ancillary process whenever such issuance is authorized by the "all writs" statute as "necessary and appropriate in aid of [its] jurisdiction." Nothing in *Ahrens* v. *Clark* purports to limit the power of courts to issue ancillary process, or to overrule the many cases holding that a court having an existing proceeding before it may by writ of habeas corpus issued in aid of its jurisdiction order the production of prisoners confined outside the district. See *supra*, pp. 37–38.

This conclusion is confirmed by the derivation of Section 2241 from R. S. 751, 752, and 753 (28 U. S. C. (1946 ed.) Sections 451–453). Only R. S. 752, which was concerned with "writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty" (the constitutional writ), contained the limiting phrase "within their respective jurisdictions" on which the decision in *Ahrens* v. *Clark* in large part rested. R. S. 751, empowering the district courts to issue "writs of habeas corpus" generally, contained no such limitation, nor did R. S. 753, which, *inter alia*, permitted the issuance of the writ when "necessary to bring the prisoner into court to testify". The Reviser's Notes merely state that these provisions were consolidated into Section 2241 "with changes in phraseology necessary to effect the consolidation." There was no suggestion of intention to narrow the authority to issue ancillary writs of habeas corpus, which had almost

invariably been assumed to extend outside the district, by the present language empowering judges to grant writs of habeas corpus generally "within their respective jurisdictions". This intention not to change existing law can be given effect if the trial courts are held to have authority to issue ancillary writs in cases already within their jurisdiction—just as they may issue nation-wide subpoenas in certain types of cases. Certainly, there can be no doubt that neither the Revisers nor anyone else meant to curtail the previously existing powers of the court in such cases.

The majority below relied on the statement in *Ahrens* v. *Clark, at* p. 191, that "it would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ." These considerations, while undoubtedly of force in determining which district court has jurisdiction to initiate a habeas corpus proceeding, have little relevance to the well-settled use of the writ in aid of an existing jurisdiction. We think that where issuance of the writ is necessary to enable the court effectively to exercise its jurisdiction over an existing proceeding, reasons clearly exist for holding that Congress, by the "all writs" section, authorized its issuance. Moreover, the history and purposes of the present statute show that production from a distant district, where

appropriate, was expressly contemplated, partly because it was thought to be easier to transport the prisoner to the district of trial than the other witnesses to the district of confinement. See pp. 27–30, *supra*.

The court below also doubted the adequacy of the writ of habeas corpus *ad testificandum* because it would only produce the prisoner when he was needed to testify as a witness (R. 47). But the writ *ad prosequendum* would seem to be broad enough to cover the production of a prisoner in order to prosecute his own case, when his presence for that purpose is deemed necessary by the court. Since, in this case his own testimony as to his knowledge of the alleged double allegiance of his counsel would doubtless be important, the writ *ad testificandum* was properly sought and the Court need not consider whether the writ must be as closely confined to common law precedent as is seemingly suggested below. See pp. 34–36, *supra*.

It is significant that, so far as we have been able to ascertain, no court has experienced any difficulty in procuring the attendance at a hearing under Section 2255 of a prisoner confined outside the district. In numerous instances prisoners have been brought from outside the district for hearing.[21]

Nor has this power ever been challenged by the Department of Justice, which, of course, has

[21] In Appendix II, *infra*, p. 189, we have listed 23 such cases, based on information reflected in the reported decisions or obtained from the files of the various United States Attorneys. Generally, production of the prisoner has been

custody of federal prisoners. The regulations of the Department of Justice clearly contemplate service of, and compliance with, writs of habeas corpus to secure the presence of prisoners confined outside the district, where ancillary to an existing jurisdiction. Department Circular 2242, (issued December 9, 1931), directs United States Marshals to serve on the warden or superintendent of any federal penal or correctional institution any writ of habeas corpus from a federal court to produce a federal prisoner to testify as a witness or to be prosecuted on some other charge.[22] It provides that upon service of the writ the prisoner shall be surrendered to the custody of the marshal who shall produce him in court in response to the writ and hold him subject to the further order of the court. During such time as he is not required to be in attendance in court the prisoner is to be housed in the nearest suitable available jail. Section 720 of the Marshals' Manual specifies that

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accomplished by some form of the writ of habeas corpus. So far as we are informed, power to issue such a writ has been doubted in only one case besides the present. *United States* v. *Kratz*, 97 F. Supp. 999 (D. Neb.), *infra*, p. 187. In that case the prisoner was, at the court's request, brought within the district by administrative order of the Bureau of Prisons.

[22] This direction is without limitation as to the place of confinement, in so far as it applies to production of a prisoner as a witness in a criminal case or for prosecution. Where the prisoner is desired as a witness in a civil case, the direction is limited to cases in which he is confined within the district, or without the district but within 100 miles of the place of holding court, cases not within these limitations being referred to the Director of the Bureau of Prisons.

the prisoner, while confined in the local jail, will be permitted to receive his "attorney, and other persons with whom it may be necessary for him to confer to prepare properly the defense of his case."[23] See also Sections 51–55 of the Manual of Policies and Procedures for the Administration of the Federal Penal and Correctional Service.

These provisions, while not specifically addressed to the production of prisoners on motions such as the present, have been construed by the Department as applicable to such motions. We have been advised by the Director of the Bureau of Prisons that it is the practice of federal wardens and superintendents to secure authorization from the Bureau for the transmittal of any prisoner to another district pursuant to a writ and that in no case arising under Section 2255 has such permission been denied. Inquiries which we have made of all United States Attorneys have similarly failed to disclose any case in

[23] A prisoner from Alcatraz is not permitted to have interviews with any person "except those necessary and pursuant to the terms of the writ on which he is produced." This phraseology clearly recognizes the power of the court to make such provision for consultation with counsel and preparation of a case as may appear appropriate.

That ample power exists to afford full opportunity to consult with counsel to prepare a case is illustrated by *United States* v. *Rogers* (D. Utah) in which the United States Attorney informs us that the prisoner was held within the district for a month prior to the hearing to enable him to prepare his case. (See Appendix II, *infra*, pp. 196–197.) See also *United States* v. *Monti* (E. D. N. Y.), Appendix II, *infra*, p. 190.

which a writ, issued in connection with a proceeding under Section 2255 for production of a prisoner from outside the district, has not been complied with. See Appendix II, *infra*, p. 187.

Unquestionably, if the district court in this case, in response to respondent's request, ordered the Department to bring him to the district of trial for the purpose of testifying, the Department would have complied in accordance with its uniform policy in similar cases—and particularly since the Department has officially admitted that respondent has a right to be present at the hearing. The court below was so advised in the Government's petition for rehearing. Accordingly, it is plain that the difficulties which disturbed the majority below are wholly unreal.

2. *Right to a hearing.*—The majority below felt also that even if power to produce a prisoner existed, § 2255 denied him any effective right to a hearing. It thought that that section "provides for a hearing on the issues of fact *ex parte* the imprisoned man, of which he is given no notice and at which his body need not be produced". (R. 29). We believe that its opinions reflect a number of misunderstandings of the section. Because of the doubts manifested in the opinions below as to the procedure under § 2255, and because that section does not spell out the procedure in any detail, we think it appropriate to give a fairly detailed statement of what we believe to be the proper procedure. When that

procedure is correctly understood, any contention of inadequacy vanishes.

(a) Section 2255 permits summary dismissal if "the motion and the files and record of the case conclusively show that the prisoner is entitled to no relief." This provision corresponds closely to the first paragraph of § 2243, permitting summary dismissal of a habeas corpus application if it "appears from the application that the applicant or person detained is not entitled" to be released. Such summary dismissal of habeas corpus petitions which on their face are without merit was approved in *Walker* v. *Johnston*, 312 U. S. 275, 284. Probably the majority of habeas corpus applications filed are thus dismissed summarily.

Section 2255 differs from the comparable habeas corpus provision in expressly permitting the court to look at the outset to the files and record of the case—a difference presumably reflecting the fact that these files and record are already in the sentencing court. A court may take judicial note of its own files and records.[24] The files and record could, however, be brought before the habeas corpus court not only as evidence at a hearing (see §§ 2247, 2249) but also as exhibits to a return filed by the warden. See, *e. g.*, *Waley* v. *Johnston*, 316 U. S. 101, 103. There can be no question of the propriety of the

[24] *United States* v. *Pink*, 315 U. S. 203, 216; *Wells* v. *United States*, 318 U. S. 257, 260; *National Fire Insurance Co.* v. *Thompson*, 281 U. S. 331, 336, and cases cited.

court's reliance on its own record for such facts as the record may establish and as are not denied by the motion, or to determine whether the questions raised by the motion have been adjudicated at the trial, on appeal, or on a prior application. In addition, we believe that a motion can be dismissed summarily if its allegations are contradicted by the record, which in view of the Court Reporter Act (28 U. S. C. 753) would include all the testimony and all proceedings on arraignment, appeal, and sentence. The general rule on habeas corpus has been that only allegations "not inconsistent with the record" may be considered. *Johnson* v. *Zerbst,* 304 U. S. 458, 466; see also *Riddle* v. *Dyche,* 262 U. S. 333, 335. Thus, in *Walker* v. *Johnston, supra,* at 284, this Court said that a habeas corpus petition could properly be dismissed without a hearing on the basis of "incontrovertible facts, such as those recited in a court record." See also *Cochran* v. *Kansas,* 316 U. S. 255, 256.[25] It is unnecessary, however, to consider now the extent to which that rule is applicable also to motions under § 2255,[26] for in the present case we have made

[25] Some cases have held or said that formal recitals of record, although presumptively correct, may be attacked. See *Centers* v. *Sanford,* 120 F. 2d 217, 218 (C. A. 5); *Curtis* v. *Hiatt,* 161 F. 2d 621, 623 (C. A. 3).

[26] One court has assumed that it is applicable. *United States* v. *Sturm,* 180 F. 2d 413, 414 (C. A. 7). Another court, in permitting a formal recital to be impeached by reference

no contention that facts established of record preclude a hearing on petitioner's allegations.

(b) If the motion is not thus subject to summary dismissal, the court is directed to cause notice to be served on the United States Attorney and to grant a prompt hearing. We think it clear that with the service of notice on the United States Attorney, the proceeding ceases to be *ex parte*, and becomes an ordinary adversary proceeding in which each party is entitled to be served with any pleadings or affidavits filed by his adversaries, to be notified of any hearing, and, if evidence is taken, to be given adequate opportunity to present evidence and refute his opponent's evidence. The court below seems to have been led to the contrary conclusion by the fact that the first sentence of the third paragraph of Section 2255 states:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served

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to the transcript, has suggested that the rule under Section 2255 should be different than in habeas corpus, on the theory that a motion under § 2255 is a direct and not a collateral attack on the judgment of conviction. *Snell* v. *United States*, 174 F. 2d 580, 582 (C. A. 10). Compare the power of the sentencing court at any time to correct an illegal sentence and to correct clerical mistakes. Fed. Rules of Crim. Proc., Rules 35 and 36; *Downey* v. *United States*, 91 F. 2d 223 (C. A. D. C.).

> upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. * * *

The court below construed this provision as meaning that "the only notice of the hearing" was to be given the United States (R. 30). But the notice referred to in the statute is notice of the *motion*. The United States would not be aware of the motion if the United States Attorney were not notified. The statute says nothing, however, as to notice of the date of the hearing. Since it is the prisoner to whom the court is directed to "grant a prompt hearing" it would seem obvious that he was intended to be notified. Insofar as we are aware, in all courts all parties are notified of the date of hearings, usually by the clerk. Doubtless it was not thought necessary to include an express provision to that effect in Section 2255. But the statute certainly cannot be read as providing for a hearing with notice only to the United States and not to prisoners, for such a proceeding would not accord a "hearing" in any ordinary sense. It may be noted that §§ 2243 and 2245 make no express provision for service of the return or answer on the prisoner in a habeas corpus proceeding, or for notice to either party of a hearing or of the taking of deposition; yet we think plainly all are contemplated and implied.

(c) Although the statute does not so provide, we think it is entirely appropriate, prior to

setting the motion down for hearing, to adopt procedures to clarify and make specific the issues. In *Walker* v. *Johnston*, 312 U. S. 275, this Court approved such a procedure in habeas corpus despite the absence of any statutory provision for it. It said (at p. 284):

> Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge.[27] This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to

[27] Similarly, relief has been granted under § 2255 without a hearing. *Snell* v. *United States*, 174 F. 2d 580 (C. A. 10).

the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.[28]

The same function of rendering specific the "often inconclusive" allegations of a motion may be served by an answer by the United States attorney, to which the moving party might be required to respond.[29] Further proceedings to clarify the issues would also seem permissible where appropriate.[30]

(d) If, from the pleadings as thus made specific, issues of fact emerge, the statute requires a hearing. Since the motion is not part of the

[28] The practice thus approved is now embodied in 28 U. S. C. 2243. Indeed, under that section issuance of the writ now has the same effect as issuance of a show cause order; it merely calls upon the warden to answer and the prisoner is not required to be produced until a hearing is held after the answer is filed.

[29] In a number of districts the practice of filing an answer has been followed, see Appendix II, pp. 187–197, *infra*. Other procedures adapted to the same purpose might be a motion to dismiss, *United States* v. *Fleenor*, 177 F. 2d 482 (C. A. 7), a. l a show cause order, *United States* v. *Calp*, 83 F. Supp. 152 (D. Md.).

[30] Thus, in *United States* v. *Calp*, *supra*, n. 29, after the petitioner filed a general traverse to the United States Attorney's return to the show cause order, the court directed the clerk to write the prisoner calling attention to certain specific statements in the record apparently contradicting his allegations, and to the fact that, although he contended that coercion practiced in obtaining a confession which was not used vitiated his subsequent plea of guilty, he did not now deny his guilt. The letter gave permission to file a more specific reply or affidavit which the prisoner failed to do. The court thereupon dismissed the motion without hearing.

original proceeding (*Bruno* v. *United States*, 180 F. 2d 393 (C. A. D. C.)), it would seem that the hearing is essentially civil in nature, as it is in habeas corpus. *Ex parte Tom Tong*, 108 U. S. 556. In habeas corpus the prisoner has no right to be confronted with the witnesses against him. See *Burgess* v. *King*, 130 F. 2d 761 (C. A. 8); *Irvin* v. *Zerbst*, 97 F. 2d 257 (C. A. 5), certiorari denied, 305 U. S. 597. The 1948 amendments expressly authorize the court to take evidence by deposition or, with certain safeguards, by affidavit in habeas corpus cases. 28 U. S. C. 2246. We see no reason why depositions or affidavits may not similarly be used under § 2255, provided the prisoner or his counsel are given adequate opportunity to put questions to the deponent or affiant, orally or in writing, and to offer counter evidence.[31] But we think the requirement that the motion be set for hearing unless "the motion and the files and record of the case" conclusively show that the prisoner is entitled to no relief clearly means that any evidence other than the files and record which the judge considers in disposing of the motion must be received in a manner which gives the prisoner an opportunity to respond to it. It is for this reason that we think that the action of the district court in taking evidence *ex parte* was unauthorized here.[32]

[31] Compare the requirement of § 2246 that "If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits."

[32] A similar procedure was followed in *Crowe* v. *United*

(c) Section 2255 differs from habeas corpus as to the requirement of the prisoner's presence at the hearing. Production of the prisoner at habeas corpus hearing is required by § 2243 unless the hearing involves only issues of law.[33] Production at a § 2255 hearing, on the other hand, is discretionary. The court "may * * * de-

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States, 175 F. 2d 799, 801 (C. A. 4). There the trial judge "investigated the charges contained in the motion" by examining under oath the United States Attorney, F. B. I. agents, and the prisoner's trial counsel, all, apparently without notice to the prisoner. The Court of Appeals, in affirming the denial of the motion, considered their evidence with apparent approval of the practice followed. A similar practice has been followed in at least one other district within the Fourth Circuit. (See Appendix II, p. 194, *infra*.)

In the *Crowe* case, the Court of Appeals also thought that the motion could have been denied on its face, as raising issues which could and should have been presented at the trial and which had been adjudicated on a prior application. Similarly, Judge Pope thought the present motion could have been denied on its face (R. 41–43) and that the testimony taken was immaterial (R. 43). Thus, in both cases the trial judge may have acted on the theory that, although he was prepared to deny the motion on its face, he wished to make doubly sure of its lack of merit by conducting an *ex parte* investigation. For reasons indicated, however, we think the taking of evidence *ex parte* is unauthorized.

[33] This requirement is not contradicted or curtailed by the provision of § 2246 that evidence may be taken by deposition or, in the discretion of the court, by affidavit. The Judicial Conference proceedings clearly show that the latter provision, drafted by the Conference, was not intended to modify or restrict the right of the prisoner to be produced in court, as established in *Walker* v. *Johnston*, 312 U. S. 275. The supplemental report of the habeas corpus committee, submitted to the Conference in 1943, states:

"Your Committee considered a suggestion to the effect that

termine such motion without requiring the production of the prisoner at the hearing.'"[34]

Two views have been expressed as to the criteria which should govern the court's discretion in ordering a prisoner produced. The Court of Appeals for the Fourth Circuit has said in *Crowe* v. *United States*, 175 F. 2d 799, 801:

> Only in very rare cases, we think, will it be found necessary for a court to order a prisoner produced for a hearing under 28 U. S. C. A. § 2255. * * * Production of the prisoner should not be ordered merely because he asks it, but only in those cases where the court is of opinion that his presence will aid the court in arriving at the truth of the matter involved.[35]

On the other hand the Court of Appeals for the Tenth Circuit in *Barrett* v. *Hunter*, 180 F. 2d 510, 514, certiorari denied, 340 U. S. 897, has stated:

> We do not think it was intended by such provision to give the court an absolute discretion. Rather, we think the intention

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a judge in a habeas corpus proceeding should have discretionary authority to dispense with the production of the prisoner in court, with the provision that his testimony be taken by deposition or before a commissioner. Your Committee was of the opinion that the laws should not be changed in this respect."

See also the Reviser's Note to § 2243, stating that:

"The fifth paragraph providing for production of the body of the detained person at the hearing is in conformity with *Walker* v. *Johnston*."

[34] This provision was not in the Judicial Conference draft; it was added by the Revisers without explanation.

[35] In that case, however, the court also said that the motion

> was to provide that the court may entertain and determine the motion without requiring the production of the prisoner when the motion or the records and files of the case conclusively show that the prisoner is not entitled to any relief, or where the presence of the prisoner is unnecessary to afford him the relief to which he is entitled, or where only issues of law are presented. But where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally, in the exercise of a sound discretion, the Court should require the production of the prisoner.[36]

Thus, apparently the Fourth Circuit would require the prisoner's presence only when his testimony in open court is deemed necessary to aid the court in determining the issues, while the

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could properly have been denied on its face (see Note 32, *supra*).

Compare *Carvell* v. *United States*, 173 F. 2d 348 (C. A. 4): "It would destroy all prison discipline if merely by filing a motion with no more merit than the one here, prisoners could have themselves transported about over the country for the purpose of testifying on the hearing of such motions."

[36] In *Cherrie* v. *United States*, 179 F. 2d 94 (C. A. 10); the trial judge had denied a motion without hearing, resting his decision in part on his recollection of the trial; the Court of Appeals reversed, holding that since the record did not clearly disclose an intelligent waiver of the right to counsel, the moving party was entitled to a hearing. On remand, *United States* v. *Cherrie*, 90 F. Supp. 261 (D. Wyoming), the prisoner was apparently brought from Leavenworth to Wyoming for a hearing and the court made findings that the waiver was intelligent, which were affirmed on appeal. *Cherrie* v. *United States*, 184 F. 2d 384 (C. A. 10).

Tenth Circuit would generally require his presence whenever a factual issue was to be tried. These expressions may reflect only a difference in emphasis. There appear, however, to be appreciable differences in the practice of the various district courts. The majority of United States Attorneys have furnished us with statements of the practice in their districts, which we have summarized in Appendix II, *infra*, pp. 187–197. Those statements indicate that in a number of districts it is the fairly uniform practice, whenever issues of fact are presented which cannot be resolved from the motion and the files and record, to have a hearing in open court at which the prisoner is present (E. g., S. D. Ga., N. D. Iowa, W. D. La., N. D. Ohio, N. D. Okla., W. D. Okla.). In other districts, however, the practice of taking the prisoner's testimony by deposition or affidavit without producing him at a hearing, and of protecting his rights by appointment of counsel for him, by furnishing him with a copy of any testimony taken at a hearing, and by other means, has been generally used (E. g. S. D. Ind., E. D. La., E. D. Mo., S. D. N. Y., E. D. N. C., M. D. N. C., W. D. N. C.).

We think it clear that the presence of the prisoner at a hearing under § 2255 is not required every time factual issues are raised on which the court receives evidence outside the files and record of the case. If Congress had intended so to require, it would doubtless have used the formula

which it used, in the same chapter of the revised Code, in Section 2243.[37] Particularly since the Court Reporter Act, 28 U. S. C. 753, now minimizes the area of possible dispute over many factual issues, there may well be a number of situations in which representation by counsel at a hearing in court is adequate, or in which the entire proceeding can be conducted by deposition and affidavit without the taking of any testimony in open court. Compare *Boone* v. *Lightner*, 319 U. S. 561; *Cross* v. *Williams*, 149 F. 2d 84 (C. A. 8). One example is suggested by *United States* v. *Gallagher*, 94 F. Supp. 640 (W. D. Pa.), in which the only factual issue was as to the correct name of the prisoner.[38] There may well be others in which the testimony of the prisoner is not offered, or is immaterial, or would, if received, be so brief and of such a character as not to justify the expense of transporting him. When other methods of giving the prisoner a fair hearing are employed, the denial of an absolute right to be present does not render the procedure inadequate in the statutory sense.

As we point out below, *infra*, pp. 74–79, at the time of the adoption of the Constitution and for

[37] Section 2243 provides: "Unless the application for the writ and the return present only issues of law, the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

Section 2243, like the quoted sentence of Section 2255, was drafted by the Revisers and not by the Judicial Conference.

[38] The United States Attorney has confirmed that the prisoner was not produced in this case. The court granted the prisoner's motion.

a century thereafter, a convicted person had no right to be released on habeas corpus because of a denial of constitutional right in the proceedings leading to his conviction. Moreover, the right on habeas corpus to a hearing of issues of fact outside the record is derived from statutes greatly liberalizing the habeas corpus procedure over what it was when the Constitution was adopted. As this Court said in *Walker* v. *Johnston*, 312 U. S. 275, 285, on the question whether on habeas corpus factual issues could be disposed of on affidavits without the production of the prisoner, or only by a hearing in open court at which the prisoner is produced:

> It is not a question of what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R. S. 761 is derived was adopted by Congress. The question is what the statute requires.
>
> As we said in *Johnson* v. *Zerbst*, 304 U. S. 458, 466, "Congress has expanded the rights of a petitioner for habeas corpus."

Congress undoubtedly has power to alter procedures which it itself has created. In view of the absence of any constitutional requirement that the prisoner be present, and in view of the textual evidence in § 2255 that Congress did not intend to impose an absolute requirement of his production, we do not believe that the production of the prisoner in every case can be said to be necessary.

to make the motion procedure adequate and effective within the meaning of § 2255.

We do not dispute, however, that where substantial issues of fact are presented on which the testimony and credibility of the prisoner is important, he should, absent special circumstances, be produced. For this reason, we agree with the court below that, because of respondent's importance as a witness upon the crucial question presented by his motion, he should be produced at the hearing. This will enable him to be present during the hearing for other purposes than as a witness, just as in habeas corpus. Since the remedy by motion will thus be clearly adequate in the present case, we believe it is unnecessary at this time—even if it were possible—to attempt to define or catalogue the considerations which might justify a court in declining to produce a prisoner in other circumstances.

(f) The opinion below contains some suggestion that the remedy under § 2255 is also inadequate because it fails to provide for as prompt a hearing as would be afforded on habeas corpus. Reliance is placed for this on the fact that § 2243 sets very short time limits on the filing of a return and on the date of hearing. These limits can, however, be extended for good cause shown. Section 2255 requires the court to grant a "prompt hearing" on the motion. There would thus appear to be no difference in spirit between the two procedures, and no reason why relief by motion should not be as expeditious as relief by habeas corpus.

C. IN ANY EVENT, THE COURT SHOULD NOT HAVE HELD THE MOTION REMEDY INADEQUATE BEFORE THAT REMEDY HAD BEEN PURSUED TO COMPLETION

The foregoing clearly shows that the motion remedy was intended to be an adequate substitute for habeas corpus in cases presenting factual issues as in other cases; that the section authorizes procedures capable of carrying out that intention; and that there is no reason to anticipate that it will not prove adequate and effective. Even if the matter were more doubtful than it is, however, we believe that orderly procedure requires that the motion remedy be pursued to completion before resort to habeas corpus can be permitted. In general, a requirement of resort to an exclusive procedure cannot be avoided unless that procedure is plainly incapable on its face of affording relief.[39] Thus, the requirement of exhaustion of state remedies as a condition to application to a federal court for habeas corpus by a state prisoner, *Darr* v. *Burford*, 339 U. S. 200, has been insisted upon despite a showing that the adequacy and availability of the state remedy was very doubtful. See *Marino* v. *Ragen*, 332 U. S. 561, 563 (concurring opinion); *Young* v.

[39] Cf. *Yakus* v. *United States*, 321 U. S. 414, 435:

"Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it * * *."

Ragen, 337 U. S. 235. This policy is particularly applicable where the prescribed procedure is in a federal court, so that the court of appeals and this Court have full power to correct a denial of procedural right, should any occur. Cf. *Yakus* v. *United States*, 321 U. S. 414, 434.

Accordingly, we think that, once the errors into which the district court fell had been corrected by the Government's concession that the prisoner was entitled to be present at a hearing, the court of appeals should have remanded the cause for hearing. Only if, after hearing, it appears that it is impossible under § 2255 to afford respondent adequate opportunity for an adjudication of his contentions would a habeas corpus petition become appropriate. We are confident that a remand will show that the difficulties which troubled the majority below are nonexistent.[40]

[40] There may be unusual circumstances not here present in which it could be said, in advance of resort to it, that the motion remedy would be inadequate. This might occur if, in time of war, communications with the district in which the prisoner was sentenced had been cut off; or if execution of a death sentence was imminent (although even there the better practice would seem to be for a habeas corpus court merely to stay execution until application to the sentencing court could be made). One district court has suggested that resort to habeas corpus might be permitted if the sentencing court was unduly delaying action on the motion. *St. Clair* v. *Hiatt*, 83 F. Supp. 585, 587 (N. D. Ga.), affirmed, 177 F. 2d 374 (C. A. 5), certiorari denied, 339 U. S. 967.

II

SECTION 2255 IS NOT A SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS WITHIN THE MEANING OF ART. I, SECTION 9, OF THE CONSTITUTION

A. THE CONSTITUTION GIVES CONGRESS BROAD POWER TO REGULATE THE JURISDICTION OF FEDERAL COURTS TO ISSUE WRITS OF HABEAS CORPUS AND THE PROCEDURE UPON SUCH WRITS

The majority of the court below appears to have regarded the constitutional guaranty against suspension of the writ of habeas corpus as fixing immutably various details of habeas corpus procedure as it existed in 1789. The framers of the Constitution, in this area as in others, carefully avoided placing the law in any such strait-jacket. Their concern was to guard against the denial of any remedy to one unlawfully detained, not to prescribe procedural details. This is clearly shown by the discussions attending the adoption of Article I, § 9, of the Constitution, the historical evils at which that provision was aimed, the subsequent practice of Congress in prescribing the scope of and procedure on habeas corpus, and the uniform course of judicial decision recognizing the validity of that practice.

The only mention of the writ of habeas corpus in the Constitution is the provision of Article I, § 9, cl. 2, that:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The discussions attending the adoption of this provision illustrate the breadth of the framers' objective. Charles Pinckney offered the following motion to the constitutional convention (5 Elliot's *Debates* 445):

> The privileges and benefit of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding — months.[41]

When Pinckney's motion came up for discussion, Madison's notes contain the following entries (5 Elliot's *Debates* 484):

> Mr. Rutledge was for declaring the *habeas corpus* inviolate. He did not conceive that a suspension could ever be necessary, at the same time, through all the states.

[41] Pinckney's draft was apparently taken from the Massachusetts Constitution of 1780 which provided (c. 6, art. 7): "The privilege and benefit of the writ of *habeas-corpus* shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months." The New Hampshire Constitution of 1784 contained a similar provision with suspension limited to three months. The Georgia Constitution of 1777 provided: "The principles of the habeas corpus act shall be a part of this constitution." No other constitution in force at the time of the convention referred to the writ, although some contained provisions against the suspension of statutes generally.

> Mr. Gouverneur Morris moved, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless where, in cases of rebellion or invasion, the public safety may require it."
>
> Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases, to keep in gaol or admit to bail.

The Morris motion carried. All agreed to the part reading; "The privilege of the writ of *habeas corpus* shall not be suspended"; North Carolina, South Carolina, and Georgia voted against the "unless" clause. Subsequently the word "where" was changed by the committee on style to read "when," and the provision became part of the Constitution.

The provision thus adopted was in negative form; it did not affirmatively declare the right of an imprisoned person to the writ. Four of the state ratifying conventions, apparently deeming this inadequate, proposed the inclusion in a bill of rights, to be added to the Constitution, of an affirmative guaranty of the privilege of habeas corpus. The New York convention proposed the following (1 Elliot's *Debates* 328):

> That every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of

> public danger, the Congress shall suspend the privilege of the writ of *habeas corpus*.

Virginia (3 *id.* 658), North Carolina (4 *id.* 243), and Rhode Island (1 *id.* 334) suggested the following (with slight variations in punctuation):

> That every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed.

However, when the First Congress proposed a bill of rights consisting of twelve amendments to the Constitution, of which ten were later ratified, none of the proposed amendments was concerned with the writ of habeas corpus.

The foregoing clearly indicates, we think, that the framers of the Constitution were concerned merely with assuring the availability of *some* remedy for persons unlawfully detained, and that they had no thought of prescribing the procedural details of that remedy. The evils at which the clause was evidently directed bear this out. Despite the common law decisions and statutes establishing the writ in England, the Crown had on numerous occasions succeeded in frustrating all inquiry into the cause of a man's detention. It was such a total denial of any remedy for unjust detention that the framers had in mind in prohibiting suspension of the writ.[42]

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[42] For the creation and development of the writ in England, and for examples of its suspension or frustration, see Church, *Habeas Corpus* (2d ed. 1893); Hurd, *Habeas Corpus* (2d ed.

Although the origins of the writ in England are somewhat obscure, it had by the 17th Century become established as the appropriate process for checking illegal imprisonment by public officials or inferior courts. In *Darnel's Case,* 3 How. St. Tr. 1 (1627), the court held that the command of the King (*per special mandatum regis*) in the form of a warrant of arrest signed by two members of the privy council, was a sufficient answer to the writ, against defense objections that even the privy council had to assign a sufficient cause of commitment. Section 5 of the Petition of Right, 3 Car. I, c. 1 (1627) to which the King consented in return for certain financial considerations, reflects the concern which this decision caused; it recited that contrary to the Great Charter and good laws and statutes of the realm, divers of the King's subjects had "of late been imprisoned without any cause" shown, and when they were brought up on habeas corpus, no cause was shown but the special command of the King, yet they were nevertheless remanded to prison. It was therefore prayed that "no freeman, in any such manner as is before-mentioned [shall] be imprisoned or detained." Subsequently an act

1876); 9 Holdsworth, *History of English Law*, 112 *et seq.* (1932); 2 Hallam, *History of the Middle Ages*, Chapter 8 (1862); Glass, *Historical Aspects of Habeas Corpus*, 9 St. Johns L. Rev. 55 (1934); Jenks, *The Story of the Habeas Corpus*, 18 L. Q. Rev. 64 (1902); Longsdorf, *Habeas Corpus A Protean Writ and Remedy*, 8 F. R. D. 179.

of 1640, abolishing the Star Chamber, 16 Car. I, c. 10, specifically authorized use of the writ to test the legality of commitments by command or warrant of the King or privy council.[43]

The Habeas Corpus Act of 1679, 31 Car. II, c. 2, definitively established the availability of the writ and fixed its procedural aspects for the next 131 years. Examination of the provisions of this Act, which was hailed as a great landmark of liberty, forcefully illustrates the narrow scope of the rights protected by the writ in the 17th and 18th centuries as compared with modern conceptions of it. The Act was available only to persons held on charge of crime (Sec. III).[44] Upon issuance of the writ and the return thereto the prisoner was entitled to be released upon giving appropriate recognizances to appear at the next term at a court where the offense with which he was charged was properly cognizable, unless it appeared that the offense was not bailable (Sec. III). Persons charged with treason or felony "plainly and specially expressed in the warrant of commitment" were not eligible to apply for the writ; they were, however, guaranteed the right to be indicted at the next succeeding session (or the second succeeding session if the Crown's witnesses

[43] The colonists were familiar with these events; the arguments in *Darnel's Case* were printed in pamphlet form and circulated in the colonies. Hurd, *Habeas Corpus* (2d ed., 1876), pp. 101–102.

[44] Persons imprisoned for debt were expressly excepted (Sec. VIII).

could not be ready sooner) or bailed (Sec. VII). "Persons convict or in execution by legal process" were altogether excluded from the benefits of the Act (Sec. III). Within these limits the Act made important procedural advances. The writ could be issued in term time or vacation by any superior court judge (i. e., the Chancellor, any Justice of King's Bench or Common Pleas, and the barons of the Exchequer) (Sec. III).[45] Times were set forth within which the return was to be made and the writ adjudicated (Sec. III). Any sheriff or other jailer who refused to comply with the writ was subject to punishment (Sec. V). Any judge who unlawfully denied a writ was subject to a large forfeiture to the person aggrieved (Sec. X).

The provisions of this Act were, however, suspended on numerous occasions by act of Parliament which had the effect of making 31 Car. II, c. 2, temporarily inoperative, usually as to a limited class of persons such as those suspected of treason against the King. Thus, the Habeas Corpus Act was suspended because of conspiracies against the King in 1688 (1 Wm. & Mary I, c. 2,

[45] Previously only the Chancellor and the judges of King's Bench had had the undoubted right to issue the writ. Hurd, *Habeas Corpus* (2d ed. 1876) 96. And these judges were either unable or unwilling to issue the writ except during the legal term, which lasted about six months of every year. For example, in *Jenkes' Case*, 6 How. St. Tr. 1190, the chancellor refused the writ in vacation to a man committed by the King in council for making a speech advocating the calling of a new Parliament.

7, 19) and again in 1696 (7 & 8 Wm. III, c. 11). Activities of the Jacobites resulted in suspension in 1714 (1 Geo. I, st. 2, c. 8, 30), 1722 (9 Geo. I, c. 1), and 1744 (17 Geo. II, c. 6). See *King* v. *Earl of Orrery*, 88 Eng. Rep. 75 (1722)). The American Revolution caused suspension as to persons suspected of treason or piracy. 17 Geo. III, c. 9; 18 *id.*, c. 1; 19 *id.*, c. 1; 20 *id.*, c. 5; 21 *id.*, c. 2; 22 *id.*, c. 1; see 2 *Works of Edmund Burke* 1–42.

Suspension occasionally amounted to bills of attainder and named specific individuals. Thus, the act was suspended as to six named individuals arrested as conspirators in a plot to assassinate William III in 1696. 7 & 8 Wm. III, c. 11. Other statutes authorized later rulers to continue the detention. 8 Wm. III, c. 5; 9 Wm. III, c. 4; 10 & 11 Wm. III, c. 13; 1 Ann., st. 1, c. 29; 1 Geo. I, st. 2, c. 7; 1 Geo. II, st. 1, c. 4; *Case Against Bernardi*, 13 How. St. Tr. 759.[46]

The statute 17 Geo. III, c. 9 (1777), *supra*, will serve as an example of a suspension act. It provided:

> * * * That all and every person or persons who have been, or shall hereafter be seized or taken in the act of high treason committed in any of his Majesty's colonies or plantations in *America*, or on the high seas, or in the act of piracy, or who are or shall be charged with or suspected of the crime of high treason, * * * or of piracy, * * * may be thereupon secured and de-

[46] The last survivor of the six died in Newgate in 1736. *Looking Back*, 91 Sol. J. 515 (1947).

> tained in safe custody, without bail or mainprize, until the first day of *January*, one thousand seven hundred and seventy-eight; and that no judge or justice of the peace shall bail or try any such person or persons without order from his Majesty's most honorable privy council * ** *, any law, statute, or usage, to the contrary in any-wise notwithstanding.

This suspension was extended annually until January 1, 1883, see p. 68, *supra*. In other words, suspension in England was a legislative enactment which caused the Habeas Corpus Act to cease to operate, allowing confinement without bail, indictment, or other judicial process.

A similar suspension occurred in Massachusetts shortly before the Constitutional Convention. During Shay's Rebellion in 1786–1787, the Massachusetts legislature suspended the privilege of the writ. The statute provided that "any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires" would be "continued in imprisonment, without Bail or Mainprize, until he shall be discharged therefrom by order of the Governor, or of the General Court." Mass. Laws 1786, c. 41.[47]

In short, as the debates in the Convention indicate

[47] For general discussions of the writ in the colonies see 2 Channing, *History of the United States* 221, n. 1 (1937); Goebel, *Law Enforcement in Colonial New York* 260, 288, 502–506 (1944); Hurd, *Habeas Corpus* 95–104 (2d ed. 1876); Glass, *Historical Aspects of Habeas Corpus*, 9 St. Johns L. Rev. 55, 63–64 (1934).

(see *supra*, pp. 62–64), the concern of the framers was over the power, which had been repeatedly exercised in England, to effect a total suspension of the privilege of the writ. The purpose of the clause was to provide that such a total suspension could occur only in time of war or rebellion and then only if the public safety required it.[48]

[48] This power to suspend the privilege in time of war or rebellion has several times been exercised or sought to be exercised. In 1807, after the exposure of the Burr conspiracy, Jefferson proposed a suspension of the writ for three months in cases of treason or other high crime or misdemeanor. The measure passed the Senate with one dissent but was defeated in the House. See 16 *Annals of Congress*, 44, 402 *et seq.*, 531–535; 3 Beveridge, *Life of John Marshall*, 343–348. Lincoln, without legislative authority, suspended the writ or authorized its suspension on several occasions early in the Civil War. See 6 Richardson, *Messages and Papers of the Presidents*, 16–19, 24–25, 98–99; *Ex Parte Merryman*, Fed. Cas. No. 9,487 (C. C. D. Md.). In 1863 Congress authorized suspension of the writ; the Act (Act of March 3, 1863, 12 Stat. 755) provided that:

"* * * during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue."

The privilege of the writ was also suspended in the Con-

Congress has repeatedly acted on the assumption that it has power to regulate procedure in habeas corpus, to define the grounds for issuance of the writ, and to prescribe the jurisdiction of federal courts to issue it. The Judiciary Act of 1789, Sec. 14, 1 Stat. 81, contained the following brief provision, intended to provide "efficient means by which this great constitutional privilege should receive life and activity" (*Ex Parte Bollman*, 4 Cranch 75, 95):

> *And be it further enacted*, That all the before-mentioned courts of the United States, shall have the power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case

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federacy. *In re Cain*, 60 N. C. 525, 2 Winston 141; *State* v. *Sparks*, 27 Tex 705.

The Act of April 20, 1871, gave the President the power to suspend the writ in an attempt to combat the Ku Klux Klan. 17 Stat. 13. For a time in the fall of 1871, the privilege was denied in nine South Carolina counties. 7 Richardson, *Messages and Papers of the Presidents*, 136–138, 150–151. The writ was suspended in Cavite and Batangas in 1905. *Fisher* v. *Baker*, 203 U. S. 174. It was suspended in Hawaii in 1941. *Duncan* v. *Kahanamoku*, 327 U. S. 304.

> extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

This provision clearly prohibited inquiry into the cause of detention of prisoners confined under state process. *Ex parte Dorr,* 3 How. 103. The availability of the writ was extended in 1833 to federal officers in state custody for acts in carrying out federal laws (Act of March 2, 1833, 4 Stat. 632, 634; see *In re Neagle,* 135 U. S. 1), and in 1842 to certain foreign nationals held by state officers (Act of August 28, 1842, 5 Stat. 539).

In 1867, to facilitate enforcement of the Reconstruction Acts (2 Warren, *The Supreme Court in United States History* (rev. ed.), 464), the federal writ was drastically extended to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States." Act of February 5, 1867, 14 Stat. 385. In this Act Congress for the first time made detailed regulations of the procedure on all applications for the writ. By the Act of March 27, 1868, 15 Stat. 44, Congress temporarily withdrew the jurisdiction of the Supreme Court to hear appeals from denials of the writ. See *Ex parte McCardle,* 7 Wall. 506. The provisions of the 1867 Act were codified in the Revised Statutes of 1874 and 1878. This statutory framework re-

mained substantially unchanged (with the exception of some modifications in the appellate procedure) (see 28 U. S. C. (1946 ed.) 451–466), until the revision and enactment of Title 28 in 1948.

The power of Congress thus to prescribe the attributes of the writ has never been doubted. The principle was laid down by Chief Justice Marshall in *Ex parte Bollman,* 4 Cranch 75, 94, that "the power to award the writ by any of the courts of the United States, must be given by written law"—i. e., by statute.[49] This holding has been adhered to without exception. *E. g., Ex parte Dorr,* 3 How. 103; *Ex parte McCardle,* 7 Wall. 506; *Whitney* v. *Dick,* 202 U. S. 132; *Ahrens* v. *Clark,* 335 U. S. 188; *Darr* v. *Burford,* 339 U. S. 200, 210–214. Similarly, the power of Congress to regulate habeas corpus procedure has never been questioned. E. g., *Frank* v. *Mangum,* 237 U. S. 309, 331; *Johnson* v. *Zerbst,* 304 U. S. 458; *Walker* v. *Johnston,* 312 U. S. 274. As this Court said of the issue before it in *Walker* v. *Johnston, supra,* 312 U. S. at 285:

> It is not a question of what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R. S. 761 is derived was adopted by Congress. The question is what the statute requires.

[49] Marshall excepted from this statement the inherent powers of courts "over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions."

B. IN THE EXERCISE OF THAT POWER CONGRESS COULD, IN THE CASE OF CONVICTED PERSONS, VALIDLY SUBSTITUTE FOR HABEAS CORPUS A REMEDY IN THE SENTENCING COURT

Any suggestion that the Constitution imposed an inflexible procedure on habeas corpus, or adopted the act of 31 Car. II, c. 2, is not only textually and historically unsound, but also self-defeating as applied to the remedies available to attack a judgment of conviction. For it is clear that at the time of the Constitution habeas corpus was never conceived of as a remedy available to persons convicted by a court of general criminal jurisdiction. The English Act of 1679, 31 Car. II, c. 2, which was in force in England in 1789, expressly excepted "persons convict or in execution by legal process" from those eligible to apply for the writ. (Sec. III; see p. 67, *supra*.) Similarly at common law the rule that a convicted person did not have the privilege of the writ had been applied. See Dicey, *Law of the Constitution*, 217–218.

State legislation in the United States at about the time of the Convention was generally patterned on the English Act. See 2 Kent, *Commentaries* 28. Typically the state acts likewise expressly excluded convicted persons from their benefits. See Maryland, Act of Jan. 6, 1810, ch. CXXV ("not being convict or in execution by legal process"); Massachusetss, Laws, 1784, c. 72 ("persons convict or in execution by legal process"); New Hampshire, Act of June 26, 1815, c. 45

("unless the complainant be convict, or in execution by legal process, criminal or civil"); New Jersey, Act of Mar. 11, 1795, c. dxxxvi ("other than persons convict, or in execution by legal process"); New York, Laws of 1801, c. 65 ("other than persons convict or in execution by legal process").[50]

In the federal courts, under acts of Congress prior to that of 1867, it was the settled rule that a showing that the applicant was held pursuant to a conviction by a court of general criminal jurisdiction ended the inquiry. Once the jurisdiction of the court over criminal matters was shown, its decision was deemed *res judicata* as to all matters affecting the validity of the conviction and sentence. *Ex parte Watkins,* 3 Pet. 193; *Ex parte Watkins,* 7 Pet. 568, 574; see *Ex parte Yerger,* 8 Wall. 85, 101; *Frank* v. *Mangum,* 237 U. S. 309, 330–331. Although the Court is not faced with any such question, the fact that the writ of habeas corpus as it existed when the Constitution was adopted did not extend to convicted criminals indicates that even the complete abolition of the right to the writ for such persons would not be a suspension in contravention of Article I, clause 9.

[50] As to Georgia, see note 41, p. 62, *supra*, and *State* v. *De Las Maurignos,* T. U. P. Charlton Rep. 24 (1805) which states that the "habeas corpus act, 31 Carolus 2. chap. 2, sec. 7, * * * is adopted by our constitution and our laws * * *."

The Act of 1867, 14 Stat. 385, was, however, the basis for drastic expansion in the scope of inquiry on the writ. That Act contained two provisions of primary significance for present purposes. It provided that federal courts and judges

> in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States.

In addition, it made a major change in habeas corpus procedure by providing that "the petitioner may deny any of the material facts set forth in the return, or may allege any fact * * *" and that the court or judge "shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested." This Court described the change made by the latter provision in *Frank* v. *Mangum, supra,* at 330–331:

> The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require."

These provisions of the 1867 Act, together with a growing concern of this Court for the procedural guaranties of due process in criminal cases, became the basis for a series of holdings that, where denial of constitutional right was asserted, judgments of conviction by state and federal courts could be reexamined on habeas corpus, and evidence outside the original criminal record could be taken on the question whether constitutional rights had been violated. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269; *House* v. *Mayo*, 324 U. S. 42; *Von Moltke* v. *Gillies*, 332 U. S. 708; *Price* v. *Johnston*, 334 U. S. 266.

Thus the decisions on which respondent necessarily relies in his claim for relief from his criminal conviction stem, not from any command of Art. I, Sec. 9 of the Constitution, but from the jurisdiction conferred and procedure created by the 1867 Act. See *Johnson* v. *Zerbst*, *supra*, at 466; *Walker* v. *Johnston*, *supra*, at 285–6. To the extent that they may have constitutional basis it would rest in an implication from the due process clause that where a conviction has been rendered in violation of constitutional right some corrective process must be supplied. Thus in *Johnson* v.

Zerbst, supra, at 467, this Court deemed it necessary that the writ should issue because

> no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by *habeas corpus*.

And in *Waley* v. *Johnston*, *supra*, at 104–105, this Court emphasized that

> use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, *and where the writ is the only effective means of preserving his rights*. [Emphasis added.]

In short, habeas corpus developed as a remedy in these cases because the language of the 1867 Act permitted it and because, in the absence of any other remedy, it appeared to be the only means of preserving constitutional rights. We think there can be no doubt of the power of Congress to replace habeas corpus in this area with a substitute remedy of equivalent scope in the sentencing court. The reasons which impelled Congress to the change are clearly set forth in the materials already quoted from the Judicial Conference. See *supra*, pp. 16–31. And we think

the discussion in Part I of this Brief amply shows that the new remedy affords an adequate means of redressing any violation of constitutional right.

This Court dealt with a similar question in cases coming from state courts. In various types of situations a number of states, while denying relief in habeas corpus, permit a prisoner to attack his conviction in the sentencing court by writ of error or proceeding *coram nobis*.

This Court has invariably stated or assumed that such a remedy in the sentencing court, if clearly available, satisfies a state's obligation to provide an adequate corrective process for any denial of constitutional right occurring in a criminal trial. E. g., *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688; *Ex parte Hawk*, 321 U. S. 114; *Marino* v. *Ragen*, 332 U. S. 561; *Young* v. *Ragen*, 337 U. S. 235; *Darr* v. *Burford*, 339 U. S. 200. It has recognized that "of course [a state] may choose the procedure it deems appropriate for the vindication of federal rights." *Young* v. *Ragen, supra*, 337 U. S. at 238. We believe it was clearly open to Congress to make a similar choice with respect to federal proceedings, and to avoid the unseemly spectacle of a trial by one district court of the validity of proceedings in another district court (*supra*, p. 25), by substituting for habeas corpus a remedy of equivalent scope in the sentencing court.

There can be no doubt that even within the area to which the writ traditionally applies, Congress

has complete power to specify the court in which relief from a conviction can be obtained. This is clearly established by *Ahrens* v. *Clark*, 335 U. S. 188, in which this Court construed the habeas corpus statutes as confining jurisdiction to issue the writ for that purpose to the court within whose district the prisoner is held. Although there was strenuous dissent to a construction of the statute which, in the views of the minority, resulted in a "serious contraction of the availability of the writ" (335 U. S., at 194), no question was raised by any member of the court as to the power of Congress to impose such a jurisdictional limitation. See also *Whitney* v. *Dick*, 202 U. S. 132, construing the statutes as denying jurisdiction to circuit courts of appeals to issue writs of habeas corpus except in aid of an existing jurisdiction. If Congress can confine the issuance of the writ to a single court, we see no reason why it could not choose the sentencing court rather than the court of the district within which the prisoner is confined. *A fortiori*, in dealing with an area in which habeas corpus was not available at the time the Constitution was adopted, Congress had power to substitute for habeas corpus a remedy of equivalent scope in the sentencing court.[51]

[51] In other contexts, this Court has sustained legislation confining to a single tribunal the opportunity to assert constitutional issues. E. g., *Lockerty* v. *Phillips*, 319 U. S. 182, 186–8; *Yakus* v. *United States*, 321 U. S. 414, 443–8.

C. CONGRESS CAN VALIDLY REQUIRE EXHAUSTION OF OTHER AVAILABLE REMEDIES AS A CONDITION TO THE RIGHT TO THE WRIT

As we have seen, Congress regarded the remedy by motion as an adequate substitute for relief by habeas corpus. In substituting that remedy, however, it took pains to preserve the right to apply for writ of habeas corpus in any case in which the motion procedure might prove "inadequate or ineffective." Thus, even if we are wrong in our belief that the motion will normally afford a completely adequate substitute, Congress has at most postponed resort to the writ. It is well settled that habeas corpus, as an extraordinary remedy, may be denied where other available remedies have not been exhausted. Thus, absent exceptional circumstances, it may not be used to anticipate an appeal. *Adams* v. *United States ex. rel. McCann,* 317 U. S. 269; cf. *Sunal* v. *Large,* 332 U. S. 174. "The usual rule is that a prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released." *Ex parte Simon,* 208 U. S. 144, 147. See also *Rodman* v. *Pothier,* 264 U. S. 399, 402. Even administrative remedies must be exhausted, since "it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way." Mr. Justice Holmes, in *United States* v. *Sing Tuck,* 194 U. S. 161, 168.

Accordingly, this Court recently held that to delay collateral attack on a military judgment until military procedures are exhausted is no suspension of the writ. *Gusik* v. *Schilder*, 340 U. S. 128, 131–132:

> The policy underlying the rule [of exhaustion] is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

The requirement of exhaustion of other remedies is most clearly illustrated by the cases involving prisoners convicted by state courts. It is settled that, absent extraordinary circumstances, such prisoners must exhaust all state remedies (including appeal, habeas corpus, *coram nobis*, or writ of error) and petition for certiorari to this Court therefrom before they may petition for

habeas corpus in a federal court. *Ex parte Hawk*, 321 U. S. 114; *Darr* v. *Burford*, 339 U. S. 200. This judicially created postponement of the writ was given statutory sanction in 1948. 28 U. S. C. 2254; *Darr* v. *Burford*, *supra*. The rule has been consistently adhered to, even in cases in which the existence of an adequate state remedy was doubtful and the procedure for obtaining it uncertain. See *Marino* v. *Ragen*, 332 U. S. 561 (concurring opinion); *Young* v. *Ragen*, 337 U. S. 235. Its application has not infrequently resulted in several years' delay in affording a prisoner a determination of his contentions on the merits.[32] And, on occasion, it has resulted in a total denial—

[32] See, for example, the case of Henry Hawk. Hawk was convicted in 1936. He filed an application for habeas corpus in the Nebraska court; its denial was affirmed by the Nebraska Supreme Court, *Hawk* v. *O'Grady*, 137 Nebr. 639, 290 N. W. 911 (1940), certiorari denied, 311 U. S. 645. Subsequent applications to the federal district court and to this Court were then denied for failure to exhaust state remedies, since they raised matters not previously brought to the attention of the state court. *Hawk* v. *Olson*, 130 F. 2d 910 (C. A. 8), certiorari denied, 317 U. S. 697; *Ex parte Hawk*, 318 U. S. 746; *Ex parte Hawk*, 321 U. S. 114. A second habeas corpus application to the Nebraska courts was dismissed (*Hawk* v. *Olson*, 145 Nebr. 306, 16 N. W. 2d 181 (1944), and this Court reversed, *Hawk* v. *Olson*, 326 U. S. 271. An application to the federal court was then denied on the ground that he had failed to apply for a proceeding *coram nobis* in the state courts. *Hawk* v. *Olson*, 66 F. Supp. 195 (D. Neb.), affirmed *sub nom. Hawk* v. *Jones*, 160 F. 2d 807 (C. A. 8). He then applied for relief *coram nobis* and his application was for the first time heard on its merits and denied. *Hawk* v. *State*, 151 Nebr. 717, 39 N. W. 2d 561 (1949).

of relief because of the failure of the prisoner to take a procedural step which this court deemed necessary. *Darr* v. *Burford*, *supra*; cf. *Sunal* v. *Large*, 332 U. S. 174.

In the light of these cases, it is clearly not a suspension of the writ to require prior resort to a procedure whose availability is clear, which there is every reason to believe will prove adequate, and which should be pursued with expedition, as the statute requires (see p. 58, *supra*).

D. CONGRESS CAN VALIDLY PROVIDE THAT A COURT IS NOT REQUIRED TO ENTERTAIN A SECOND MOTION.

Both Judge Denman (R. 46) and Judge Stephens (R. 38–9) rested their decision that Section 2255 was unconstitutional at least in part on the view that a denial of a motion under that section was necessarily *res judicata*. It is clear that such a denial does preclude relief by habeas corpus, unless the court finds that the motion remedy was inadequate or ineffective. But it is equally clear that, in the discretion of the court, a second motion under Section 2255 may be entertained.[33]

Section 2255 provides, in language identical with that of Section 2244 relating to habeas corpus applications, that the court "shall not be required to entertain" a second motion for simi-

[33] Judge Denman's contrary view (R. 46) appears to have been based on his understanding as to the effect of a denial of a writ of error *coram nobis*. The question, however, is not what the practice was in *coram nobis*, but what the present statute says it is to be on a motion.

lar relief on behalf of the same person.[54] It thus makes applicable to motions under Section 2255 the principle of *Salinger* v. *Loisel*, 262 U. S. 224, that the question whether to entertain a second habeas corpus application rests in the discretion of the court. Cf. *Price* v. *Johnston*, 334 U. S. 266, 289. As on habeas corpus, the prisoner may, in the discretion of the court, be allowed two or more bites at the cherry. Accordingly, there is no occasion to consider whether Congress could provide that a judgment on a habeas corpus petition or a motion to vacate is, like other judgments, *res judicata* as to all matters that were or could have been presented.

In 1789 one convicted of crime in a federal court had no right of appeal.[55] He had no opportunity to attack his conviction on habeas corpus. Protection of his constitutional rights was thus left to a single trial judge. Today he has the rights of appeal to a court of appeals and petition for certiorari to this Court from his conviction; the right at any time to file a motion in the sen-

[54] The Judicial Conference was acutely aware of the difference in effect between "shall not be required to entertain" and "shall not entertain." See note 11, p. 24, *supra*.

[55] See *Ex parte Kearney*, 7 Wheat. 39, 42; *Ex parte Gordon*, 1 Black 503, 504–505. Appellate review in federal criminal cases was first authorized by the Act of March 3, 1879, 20 Stat. 354. See also the Act of February 6, 1889, 25 Stat. 655, 656; *Stephan* v. *United States*, 319 U. S. 423.

tencing court under Section 2255, with appeal to a court of appeals and certiorari to this Court; the privilege of additional applications to the sentencing court which that court may in its discretion entertain; and the right to petition for habeas corpus if the proceeding by motion in the sentencing court is inadequate or ineffective. It is difficult to see how this great enlargement in available remedies can be said to be a suspension of the narrow constitutional right of habeas corpus created in 1789.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed with directions to remand the cause to the District Court for a hearing on the merits of the motion with respondent present.

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APPENDICES

I. Judicial Conference Documents

A. Report of the Habeas Corpus Committee, submitted at the 1943 session of the Conference

To the Chief Justice of the United States and Members of the Conference of Senior Circuit Judges:

Your Committee appointed to study the subject of procedure on habeas corpus in the federal courts has given careful study to the subject, aided by officials of the Administrative Office and the Department of Justice. Mr. Will Shafroth of the Administrative Office acted as Secretary of the Committee and made a statistical study of habeas corpus proceedings in the federal courts during the fiscal year 1942. Mr. Alexander Holtzoff of the Department of Justice filed with the Committee a statement as to administrative problems in habeas corpus proceedings, sat with the Committee in the hearings and assisted in the drafting of the legislation proposed. Attached to this report are the statement of Mr. Holtzoff and the statistical tables prepared by Mr. Shafroth.

The Committee met in Washington, D. C., on May 8, 1943, and remained in session for four days during which problems relating to procedure under habeas corpus were fully discussed. It was the opinion of the Committee that the procedure in ordinary habeas corpus proceedings, such as cases arising in connection with removal, with

deportation under the immigration laws or with imprisonment under process or judgment void on the face of the proceedings, was simple and well settled; and that no action, legislative or otherwise, was required with respect thereto. With regard to proceedings brought to secure the release of a petitioner imprisoned under the judgment of a state or federal court, alleged to be void by reason of the disregard of constitutional rights of the petitioner, it was the judgment of the Committee that legislation was necessary to secure orderly procedure, to avoid unnecessary and repeated applications to different judges and to minimize the evil of unseemly conflicts between sentencing and hearing courts and between state and federal tribunals.

The present procedure in habeas corpus was adequate so long as the court hearing the application was held bound by the record made on the trial of a prisoner theretofore convicted in a state or federal court, not only with respect to questions raised on the trial but also with respect to questions that might have been raised, so that matters dehors the record could be considered only to a very limited extent as affecting the validity of the trial. In recent years, however, decisions of the Supreme Court have greatly enlarged the scope of the inquiry in habeas corpus proceedings by making that remedy available to test the validity of a judgment of a state or federal court attacked on the ground that constitutional rights of the prisoner have been violated. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Johnson* v. *Zerbst*, 304 U. S. 458; *Bowen* v. *Johnston*, 306 U. S. 19, 24; *Waley* v.

Johnston, 316 U. S. 101, 104. As said in the case last cited:

> The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103; *Bowen* v. *Johnston*, 306 U. S. 19, 24.

This review of proceedings in the trial court to determine in an application for habeas corpus, by matters dehors the record, whether conviction of the prisoner has been secured in violation of his constitutional rights, extends to convictions had in state as well as in federal courts. *Smith* v. *O'Grady*, 312 U. S. 329; *Cochran* v. *Kansas*, 316 U. S. 255; *Pyle* v. *Kansas*, — U. S. —, 63 S. Ct. 177; *Sharpe* v. *Buchanan*, — U. S. —, 63 S. Ct. 245; *People* v. *Wilson*, — U. S. —, 63 S. Ct. 840. And when state remedies have been exhausted, there is doubt whether a habeas corpus proceeding can now be dismissed in the federal courts under the doctrine that such remedy will lie in the federal courts only in "rare cases when circumstances of peculiar urgency are shown to exist." See cases last cited. It has been held that habeas corpus will lie where there is allega-

tion that petitioner's imprisonment is in violation of rights guaranteed him by the Constitution and that his remedies under state law have been exhausted. See *Mitchell* v. *Youell*, 4 Cir. 130 F. 2d 880; *Carey* v. *Brady*, 4 Cir. 125 F. 2d 253; *Gall* v. *Brady*, 39 F. Supp. 504.

Where petitioner is imprisoned under the judgment of a state or federal court, and the conviction is attacked as void on the ground that constitutional rights have been denied on the trial, it necessarily results that the court hearing the application for habeas corpus must review the proceedings of the trial court on matters very largely dehors the record. Under the present practice, no provision is made for the trial judge to supplement the record or even for him to furnish a statement as to what occurred on the trial. On the contrary, if heard at all with respect to the matter, he must be heard as an ordinary witness. *Walker* v. *Johnston*, 312 U. S. 275. This has resulted, in one case at least, in the trial judge of a state court appearing as a witness in a habeas corpus proceeding in a federal court and testifying in defense of the proceedings had in his court. *Mitchell* v. *Youell*, 4 Cir. 130 F. 2d 880. Since state remedies must have been exhausted as a prerequisite to application for the writ, it results in many cases that the federal District Court is reviewing on habeas corpus the constitutional validity of a judgment which has been affirmed on appeal by the highest court of a state, and frequently with respect to matters which have been fully considered on that appeal. It is unnecessary to comment on the real danger involved

in a procedure which leads so readily to conflict between the state and federal jurisdictions.

While the practice of having criminal proceedings in one federal District Court reviewed and their validity determined in habeas corpus proceedings by another District Court is not open to the same objections as where a conflict between state and federal jurisdictions may arise, it is the opinion of three of the members of the Committee that this is an abuse which should be corrected, and that the question as to the constitutional validity of the trial should be raised in the trial court on motion in the nature of the old writ of error coram nobis, and that habeas corpus in another court to raise such question should not be allowed except in those rare cases where the ends of justice imperatively so require.

Another real evil which has arisen in connection with application for habeas corpus by prisoners under sentence is that there is no limitation under existing law on the number of applications which can be made, and the time of judges is consumed in hearing repeated applications involving identical contentions. Notwithstanding denial of his application, the prisoner, under the present state of the law, has the right to present the same petition to every judge having jurisdiction in the premises. Not infrequently, the same petition is presented, notwithstanding its prior denial, to half a dozen or more judges; and each is bound to give it consideration without any regard to the principle of res adjudicata.

To remedy the evils in the present practice arising out of petitions for habeas corpus by prisoners convicted of crime in the state or fed-

eral courts, your Committee has drafted two proposed statutes copies of which are hereto attached. The purpose of the first, marked "A," is to limit, except in rare cases, the right to apply for habeas corpus on the part of persons imprisoned under a conviction of crime in the state or federal courts and to substitute another remedy by motion in the nature of writ of error coram nobis to test the constitutional validity of the judgments under which they are imprisoned. The second, marked "B", has for its purpose the prescribing of a procedure which will obviate the abuses and inconveniences of the present procedure, in cases where resort to habeas corpus may be appropriate.

Comments on Statute "A", prescribing new remedy and limiting jurisdiction in habeas corpus

SEC. 1. All of the members of the Committee, except Judge Underwood, are agreed on the first section of the statute as recommended. Judge Underwood agrees that the object of the section is desirable but does not approve of the machinery devised to attain it. It will be observed that the first section applies only to the case of prisoners in custody under judgments of state courts.

The effect of the section is to require that questions as to the constitutional validity of judgments of state courts be tried in those courts. For this purpose, the statute prescribes that after the making of a motion, in the nature of application for writ of error coram nobis, in the state court, application for certiorari may be made to the Supreme Court of the United States,

and that court is given power to review by certiorari the proceedings of the state court. The certiorari will bring before the Supreme Court, not only the record made on the motion, but also the judgment of conviction under which petitioner is imprisoned. The power of Congress to prescribe a remedy in the state courts, by which the deprivation of rights under the Constitution of the United States may be inquired into and record made for review by the Supreme Court of the United States, is not thought by the majority of the Committee to be subject to doubt. The proposed statute denies to federal Circuit and District Judges the power to issue writs of habeas corpus in such cases "unless it appears that there are such exceptional circumstances of peculiar urgency that the rights of the prisoner cannot be effectively preserved by the procedure prescribed."

SEC. 2. Section two applies only to prisoners in custody under judgments of federal courts. The first part of the section provides for a motion, in the nature of a writ of error coram nobis, in the court in which the prisoner was convicted, to question the validity of a judgment assailed on the ground that it was entered in violation of prisoner's constitutional rights. It is believed that this part of the section is merely declaratory of existing law. *Holiday* v. *Johnston,* 313 U. S. 342, 349. All members of the Committee agree on this part of the section. The last sentence of the section denies to any federal Circuit or District Judge power to release under habeas corpus a prisoner authorized to apply for relief by motion under the section, unless it shall appear that

it is not practicable for his rights to be determined on such motion. Judges Stephens, Underwood and Wyanski do not agree to this sentence; and the second section of the act is accordingly presented in the alternative. It will be observed that alternative section 2 omits the last sentence contained in section 1.

Comments on Statute "B", procedural provisions

SEC. 1. Section one is presented in the alternative. The form favored by the majority of the Committee makes it discretionary with a Circuit or District Judge whether or not he shall entertain a petition for habeas corpus to inquire into the detention of a person under sentence of a state or federal court, when it shall appear that the legality of such detention has been determined in a prior application for habeas corpus and no new ground is presented in the present application. Judge Stone and the Chairman are of the opinion that alternative Section 1 should be adopted, the effect of which would be to limit petitioners to one application, unless a new ground is presented.

SEC. 2. The effect of this section is to permit the filing of a statement by the trial judge as to the facts occurring in the trial, in lieu of requiring that his evidence be taken like that of an ordinary witness.

SEC. 3. The purpose of this section is to facilitate the taking of evidence by permitting the use of affidavits with proper safeguards.

SEC. 4. The purpose of this section is to make admissible evidence taken in prior habeas corpus proceedings.

SEC. 5. The purpose of this section is to relieve petitioner of the binding effect of an untraversed return, which he inadvertently may have failed to deny, and to give to the answer to a notice to show cause the same evidentiary effect as the return to a writ.

SECS. 6 and 7. The purpose of these sections is to make readily available to the court material portions of records of conviction, and to enable petitioners to have the benefit thereof without cost.

Recommendation to District Courts

The Committee was impressed by a suggestion of Judge Underwood that much could be done to avoid the evils arising from application for habeas corpus by prisoners under sentence of federal courts, if greater care were exercised by trial courts in properly making of record matters as to which such applications ordinarily relate. That suggestion is as follows:

> It would seem that much could be accomplished in this way by a more careful preparation of the trial court records, in view of the rulings of the Supreme Court in the case of *Riddle* v. *Dyche*, 262 U. S. 333, and the more recent case of *Cochran* v. *Kansas*, 316 U. S. 255, in which the Court says, "We accept the court's conclusion that the record, showing that Cochran was represented by counsel throughout, and revealing on its face no irregularities in the trial, is sufficient refutation of his

unsupported charge that he was denied the right to summon witnesses and testify for himself." I think it would greatly reduce the number of cases, or at least put them in such shape as to make it possible to dispose of them without great consumption of time, if the trial court, where the defendant is not represented by counsel, would not only carefully advise him of his constitutional rights, especially that of assistance of counsel, but also, where a plea of guilty is entered, require the plea to be in writing, to be intelligently signed by the defendant and to expressly recite that he has been so advised and tendered counsel and has waived same, in addition to including in the sentence, which is now usually done, a statement of such facts. It is the practice in this Court not only to have the defendant sign the plea but also his attorney, when there is one, to establish the fact of his presence, and also to have the sentence include a recitation of his presence; and to include an express waiver of counsel in writing if there is no counsel. If this were done, many of the cases could be disposed of upon the record and the petitioner sent to the trial court for the correction of the record if he contends that same is incorrect.

JUNE 7, 1943.

Respectfully submitted.

JOHN J. PARKER, *Chairman.*
KIMBROUGH STONE.
ALBERT LEE STEPHENS.
E. MARVIN UNDERWOOD.
EDGAR S. VAUGHT.
CHARLES E. WYZANSKI, JR.

STATUTE "A"

A BILL To regulate the review of judgments of conviction in certain criminal cases

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if a prisoner in custody pursuant to a judgment of conviction of a court of any State, claiming that the judgment is void because in violation of the Constitution or laws of the United States, after exhausting all remedies in the courts of the State, moves in said court to vacate and set aside the judgment and either to discharge him or to resentence him, or to grant a new trial, and if the court denies the motion, or fails or refuses to act thereon within sixty days after it is presented, the prisoner after exhausting whatever rights of review may be accorded by the laws of the State, may apply within three months thereafter to the Supreme Court of the United States for a writ of certiorari. It shall be competent for the Supreme Court by writ of certiorari to require that the cause be certified to it for review and determination. In that event the Supreme Court shall have jurisdiction to review the proceedings had on the motion as well as the judgment of conviction for the purpose of determining the claim that the judgment is void because in violation of the Constitution or laws of the United States. No circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to

a judgment of conviction of a court of any State, unless it appears that there are such exceptional circumstances of peculiar urgency that the rights of the prisoner cannot be effectively preserved by the proceedings hereinabove prescribed.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming that the judgment is void because in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment is void, because in violation of the Constitution or laws of the United States, the court shall vacate and set the judgment aside and shall discharge the prisoner, or resentence him, or grant a new trial, as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it is not practicable to determine his rights on such motion because of the necessity of his presence at the hearing, or for other reason.

Judge A. L. Stephens, Judge Underwood, and

Judge Wyzanski favor the following substitute for Sec. 2:

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming that the judgment is void because in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment is void, because in violation of the Constitution or laws of the United States, the court shall vacate and set the judgment aside and shall discharge the prisoner, or resentence him, or grant a new trial, as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals.

STATUTE "B"

A BILL To regulate habeas corpus proceedings in the courts of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge shall be required to entertain any application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of any court of the United States or of any

State, if it appears that the legality of such detention has been determined by any judge of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent judicial decision or the enactment or repeal of a statute.

SEC. 2. On a hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a prisoner pursuant to a judgment of any court of the United States or of any State, the certificate of the judge who presided at the trial resulting in the judgment of conviction, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

SEC. 3. On an application for a writ of habeas corpus, evidence may be taken orally or by deposition, and in the discretion of the judge, by affidavit. If the evidence is presented in whole or in part by affidavit, any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

SEC. 4. On an application for a writ of habeas corpus documentary evidence and the transcript, if any, of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

SEC. 5. The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the

extent that the Judge shall find from the evidence that they are not true.

SEC. 6. On an application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

SEC. 7. If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

Judge Parker and Judge Kimbrough Stone favor the following substitute for Sec. 1:

That no circuit or district judge shall entertain any application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment

or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time.

[Statistical tables and memorandum of Mr. (now judge) Holtzoff omitted in printing.]

B. SUPPLEMENTAL REPORT

SEPTEMBER 28, 1943.

To the Chief Justice of the United States and Members of the Conference of Senior Circuit Judges:

Your Committee to study the subject of procedure on habeas corpus in the federal courts, after receiving letters from various judges throughout the United States, held a meeting in Washington on Monday, September 27, considered same, and begs leave to submit the following supplemental report.

1. The Committee recommends as a substitute for Statute A, Section 1, the following:

> No Circuit or District Judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any state, or to release such prisoner in any habeas corpus proceeding, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis or otherwise in the courts of the state. Where a prisoner in custody pursuant to a conviction of a court of any state, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States,

who has no adequate remedy in a state court by habeas corpus, writ of error coram nobis or otherwise, files a petition for writ of habeas corpus before any Circuit or District Judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue same and shall call to his assistance two other judges so chosen that at least one of the three shall be a Circuit Judge or a Circuit Justice, who shall constitute a special court for the hearing of such petition. Appeal shall lie from such court directly to the Supreme Court of the United States. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing same, he shall dismiss the petition, to which action an appeal shall lie to the Circuit Court of Appeals for the Circuit. The phrase "no adequate remedy" as used in this section means absence of state corrective process or existence of exceptional circumstances of peculiar urgency.

2. Lines 26–27 of Statute A, Section 2, for the words "that the judgment is void because", substitute the words "the right to be released on the ground that the judgment has been obtained."

Line 34. For the words "is void because," substitute the words "has been obtained."

Line 46. For the words "that the judgment is void because", substitute the words "the right to be released on the ground that the judgment has been obtained."

Line 54. For the words "is void because", substitute the words "has been obtained."

3. Statute B, Section 1. Line 6. After the word "judge" insert the words "or court."

4. Your Committee considered a suggestion to the effect that a judge in a habeas corpus proceeding should have discretionary authority to dispense with the production of the prisoner in court, with the provision that his testimony be taken by deposition or before a commissioner. Your Committee was of the opinion that the laws should not be changed in this respect.

5. Your Committee suggested that section 832 of Title 28 U. S. C. be amended to permit an alien as well as a citizen to prosecute a habeas corpus proceeding in forma pauperis.

JOHN J. PARKER,
Chairman, for the Committee.

C. LETTER AND MEMORANDUM FROM MR. CHANDLER TO THE [redacted] OF THE HOUSE. [redacted] COMMITTEE

[Identical letter and memorandum was sent to the [redacted] of the Senate. [redacted]]

MARCH 2, 1944.

DEAR MR. SPEAKER: In behalf of the Judicial Conference of Senior Circuit Judges I herewith submit for the consideration of the House of Representatives two bills with regard to habeas corpus procedure. These bills were approved by the Judicial Conference of Senior Circuit Judges at its annual meeting, held September 28 to October 1, 1943, upon the recommendation of a committee of the Conference, consisting of United States Circuit Judges John J. Parker, senior circuit judge of the Fourth Circuit, chairman, Albert Lee Stephens, of the Ninth Circuit, and Kimbrough Stone, senior circuit judge of the Eighth Circuit, and United States District Judges

E. Marvin Underwood, of the Northern District of Georgia, Edgar S. Vaught, of the Western District of Oklahoma, and Charles E. Wyzanski, Jr., of the District of Massachusetts. I respectfully request that these bills be introduced and hope that they may be enacted.

One of the two bills puts certain limitations on the jurisdiction of the federal courts to issue a writ of habeas corpus, testing the legality of the detention of persons held by reason of conviction of a crime by either a federal or state court; the other bill regulates the procedure in the federal courts on application for a writ for the purpose above mentioned and among other things makes applicable to habeas corpus proceedings the doctrine of res judicata.

The bill relating to jurisdiction and the first two sections of the bill relating to procedure, deal only with applications for habeas corpus by a prisoner who has been convicted in a state or federal court and who urges his conviction was secured in violation of his constitutional rights. These cases are now creating difficulties for the courts which in the opinion of the committee should be remedied. Under the present law a defendant who has been imprisoned under the judgment of a state trial court, even though that judgment has been affirmed by the highest court of the state, may then come into a United States district court and, on the ground that constitutional rights have been denied him on the trial, ask a review of the validity of the state court judgment. Frequently the review requested will be with respect to matters which have been fully considered in the state courts. The danger in-

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volved in a procedure which leads to such a conflict between the state and federal jurisdictions is apparent.

A second evil of the present system occurs by reason of the fact that the violation of the constitutional rights of the defendant is often alleged to have occurred with respect to matters outside the records, such, for example, as whether or not the defendant was given an opportunity to have counsel. Where the defendant is under conviction of a federal court, as well as where he has been convicted in a state court, the application for habeas corpus is usually made in a court other than that in which the trial took place. Under the present practice no provision is made for the trial judge to supplement the record or even for him to furnish a statement as to what occurred on the trial. On the contrary, if he is heard at all in respect to the matter, he must be heard as an ordinary witness. Sometimes clerks of court and United States attorneys have been compelled to travel considerable distances to testify in such cases and on at least one occasion the trial judge of a state court appeared as a witness in a habeas corpus proceeding in a federal court and testified in defense of the proceedings had in his court.

While the practice of having criminal proceedings in one federal district court reviewed and their validity determined in habeas corpus proceedings by another district court is not open to the same objections as where a conflict between state and federal jurisdictions may arise, it is the opinion of the Judicial Conference that the question as to the constitutional validity of the

trial should be raised in the trial court where this is feasible.

Another real evil which has arisen in connection with application for habeas corpus by prisoners under sentence is that there is no limitation under existing law on the number of applications which can be made and the time of federal judges is needlessly consumed in hearing repeated applications involving identical contentions. The Supreme Court has specifically stated that the principle of res judicata does not apply to a decision on habeas corpus refusing to discharge a prisoner (*Waley* v. *Johnston*, 316 U. S. 101, 105). Notwithstanding the denial of one application for a writ of habeas corpus, the prisoner, under the present state of the law, has the right to present the same petition to every judge having jurisdiction in the premises. Sometimes each of a half dozen judges is asked in turn to pass on the same application and each is bound to give it consideration without any regard to the principle of res judicata.

To remedy these defects in the present law, the committee has proposed, and the Conference has recommended, the bills above referred to. The first section of the jurisdictional bill would prevent a federal court from receiving a habeas corpus petition from a prisoner convicted in a state court unless it appeared that there is no state corrective process by which the prisoner can have his contention passed on, or special circumstances make such process unavailable to protect his rights. If these conditions are met, then the federal judge would be authorized to

request the senior circuit judge to call a three-judge court to hear the application.

Section two of the jurisdictional bill refers to prisoners in custody pursuant to a conviction of a United States court and provides that in such a case the remedy of the prisoner is to apply by motion to the trial court to set aside the judgment. Only when it is not practicable for the prisoner to have his right to release from custody presented on motion to the trial court because of his inability to be present at the hearing or for other reasons,—only then can he apply to any other federal judge for habeas corpus.

The procedural bill establishes the doctrine of res judicata, where the legality of the prisoner's contention has already been determined by a federal judge and no new ground is presented. However, the judge who originally passes on the application for a writ may grant a rehearing at any time. Other provisions of the bill allow the certificate of the trial judge as to the facts occurring at the trial to be filed in lieu of requiring him to testify in the habeas corpus proceedings; allow testimony to be taken by affidavit at the discretion of the judge; make admissible evidence taken on prior habeas corpus applications; and specify several procedural details in connection with the proceedings.

An attached memorandum gives some further information in reference to the present state of the law and the provisions of the bills. The Judicial Conference is of the opinion that the present law in reference to habeas corpus is de-

fective and the enactment of the attached bills is urged to cure its defects.

Yours very respectfully,

(S) HENRY P. CHANDLER.

HONORABLE SAM RAYBURN,
Speaker of the House,
Washington, D. C.

MEMORANDUM WITH REFERENCE TO HABEAS CORPUS BILLS RECOMMENDED BY THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES

Present procedure in habeas corpus in the United States courts, as governed by the statutes of the United States, is clearly and succinctly set forth in the following quotation from the opinion of Justice Roberts in the case of *Walker* v. *Johnston*, 312 U. S. 275, at pages 283 and 284:

> The statutes of the United States declare that the supreme court and the district courts shall have power to issue writs of habeas corpus; that application for the writ shall be made to the court or justice or judge authorized to issue the same by complaint in writing, under oath, signed by the petitioner, setting forth the facts concerning his detention, in whose custody he is and by virtue of what claim or authority, if known. The court or justice or judge "shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." The writ shall be directed to the person in whose custody the petitioner is detained. The person to whom the writ is directed must certify to the court or judge the true cause of detention and, at the same time he makes his return, bring the body of the

party before the judge who granted the writ. When the writ is returned a day is to be set for the hearing, not exceeding five days thereafter, unless the petitioner requests a longer time. The petitioner may deny the facts set forth in the return or may allege any other material facts, under oath. The court or judge "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitioners are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial,

and if issues of fact emerging from the pleadings are tried as required by the statute.

This procedure was adequate as long as the court hearing the application was held bound by the record made on the trial of a prisoner previously convicted in either a state or federal court, not only with respect to questions raised on the trial but also with respect to questions which might have been raised, so that matters outside the record could be considered only to a very limited extent as affecting the validity of the trial. Decisions of the Supreme Court in recent years, however, have greatly enlarged the scope of the inquiry in habeas corpus proceedings by holding that this remedy is available to test the validity of the judgment of a state or federal court attacked on the ground that constitutional rights of the prisoner have been violated with reference to matters outside the record. For example, the court has held in *Johnson v. Zerbst* (304 U. S. 458), that the denial by the trial court to a defendant of his constitutional right to be represented by counsel invalidates the judgment and entitles him to release on habeas corpus. Because of the possibilities which have been created of conflicts between state and federal courts and between federal courts of coordinate jurisdiction, the present condition is unsatisfactory. The purpose of the proposed legislation is to remedy this situation.

Section one of the first bill, referred to in the attached report of the Conference committee as Statute A, relates to applications for writs of habeas corpus by prisoners who have been convicted

in a state court. It provides that such applications can be heard by a federal court only where it appears that the petitioner has no adequate remedy in the courts of the state, and the phrase "no adequate remedy" is further defined as meaning "absence of state corrective processes or evidence of exceptional circumstances rendering such process unavailable to protect his rights." For example, where the writ of habeas corpus is not available in the state court for the purpose of protecting constitutional rights, or where, though it is available, the local prejudice is so strong as to prevent fair and adequate consideration of the questions raised, then the petitioner is entitled to file his application for a writ in the federal court on the basis that the judgment of the trial court was obtained in violation of the constitution and laws of the United States. It then becomes the duty of the judge to determine whether there is reasonable ground for the issuance of the writ. If he concludes there is, he then is required to request the senior circuit judge of the circuit in which the court is located to call together a three-judge court for the purpose of hearing and determining the application. This process is similar to that which exists for the purpose of hearing requests for injunctions suspending or restraining the enforcement or operation of any act of Congress on the ground that it is unconstitutional. The decision of the three-judge court is reviewable by the Supreme Court of the United States by writ of certiorari. If, however, the judge to whom the application is made determines that it is groundless, he may dismiss the petition and an

appeal from that decision lies to the circuit court of appeals.

Section two of the jurisdictional bill refers to prisoners who have been convicted in a federal court, and requires them, instead of making application for habeas corpus in the district in which they are confined, to apply by motion to the trial court to vacate or set aside the judgment. That court is then required to grant a prompt hearing and render its decision on the motion, from which an appeal lies to the circuit court of appeals. If it appears that it is not practicable for the prisoner to have his motion determined in the trial court because of his inability to be present at the hearing, "or for other reasons," then he has the right to make application to the court in the district where he is confined. Such an instance might occur where a dangerous prisoner, who had been convicted in the Southern District of New York, was confined in Alcatraz Penitentiary. The bill expressly provides that no circuit or district judge of the United States shall entertain an application for a writ in behalf of any prisoner unless it appears that his right to discharge cannot be determined by motion made in the trial court.

The bill relating to procedure in habeas corpus proceedings is designed to prevent the presently existing practice of "shopping around" by petitioners in the attempt to take every possible step presently available to secure their release. Sections one and two apply only to applications for a writ by prisoners who are held pursuant to the judgment of a court of the United States

or of a state. Section one provides that, when an application for a writ has once been passed on by a federal judge, that judgment shall be res judicata, unless a new ground is presented, and no circuit or district judge shall be permitted to entertain an application based on the same grounds as the one previously presented. The bill defines a new ground as including a subsequent decision of an appellate court or a change in law. It is further provided that the judge who determines the application in the first instance may grant a rehearing at any time.

Section two makes admissible in evidence, on the hearing of a habeas corpus application, the certificate of the trial judge setting forth the facts concerning the trial. Its purpose is to obviate taking the deposition of the judge or calling him as a witness.

Section three further facilitates the production of evidence at the habeas corpus hearing by providing that it may be taken by deposition or, at the discretion of the judge, by affidavit.

Section four makes admissible proceedings and evidence in behalf of the same petitioner taken at previous hearings of a similar application.

The remaining sections of the bill deal with procedural requirements on applications for habeas corpus writs.

The report of the Committee on Habeas Corpus to the Judicial Conference is attached to this memorandum in order to provide fuller information concerning the situation and the changes which are needed. Some substantial changes in the jurisdictional bill recommended in the report were made by the committee just prior to the

Conference and, after full consideration, the Conference approved both bills as they appear in the attached copies.

A BILL To regulate the review of judgments of conviction in certain criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any state, or to release such prisoner in any habeas corpus proceeding, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis or otherwise in the courts of the state. Where a prisoner in custody pursuant to a conviction of a court of any state, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a state court by habeas corpus, writ of error coram nobis or otherwise files a petition for writ of habeas corpus before any circuit or district judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue the writ and shall cause a court of three judges to be constituted as provided by section 266 of the Judicial Code, as amended, (28 USC 380a), who shall constitute a special court for the hearing of such petition. The decision of such court shall be reviewable by the Supreme Court of the United

States on writ of certiorari. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing it, he shall dismiss the petition from which action an appeal shall lie to the Circuit Court of Appeals for the Circuit, upon the filing of the certificate required by the Act of March 10, 1908, C. 76, entitled An Act Restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, as amended (35 Stat. 40, 28 USC 466). The phrase "no adequate remedy" as used in this section means absence of state corrective process or existence of exceptional circumstances rendering such process unavailable to protect the rights of the prisoner.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, or that the court was without jurisdiction, or that the sentence was in excess of the maximum prescribed by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States Attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was

in excess of the maximum prescribed by law or otherwise open to collateral attack, or that there were errors in the sentence which should be corrected, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the Circuit Court of Appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia. (Referred to in Committee Report as Statute A.)

A BILL To regulate habeas corpus proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge shall entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any state, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time, and, if the judge dies, goes out of office, or becomes disabled, a rehearing may be granted by his successor, or by the judge designated to hear the matter in the event of his disability. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

SEC. 2. On a hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment of any court of the United States or of any state, the certificate of the judge who presided at the trial resulting in the judgment of conviction, seting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certifi-

cate shall be filed with the court in which the application is pending and in the court in which the trial took place.

SEC. 3. On an application for a writ of habeas corpus, evidence may be taken orally or by deposition, and, in the discretion of the judge, by affidavit. If the evidence is presented in whole or in part by affidavit, any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

SEC. 4. On an application for a writ of habeas corpus documentary evidence and the transcript, if any, of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

SEC. 5. The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge shall find from the evidence that they are not true.

SEC. 6. On an application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

SEC. 7. If on any application for a writ of habeas corpus an order has been made permitting

the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending. (Referred to in Committee Report as Statute B.)

D. MEMORANDUM SUBMITTED BY CIRCUIT JUDGE STONE AT THE 1946 SESSION OF THE CONFERENCE

Habeas Corpus Bills

While the members of the Conference are familiar with the more important happenings in connection with the habeas corpus bills occurring since the last meeting of the Conference, it seems proper that I should report to the Conference a somewhat more detailed statement.

At the 1945 Conference, Chief Justice Stone urged that something should be done in connection with the introduction and progress of the Bills which had been approved by the Conference in 1944. As Judge Parker (Chairman of the Conference Committee) was in Europe, the result was that I was directed by the Conference to give attention to the matter.

Before leaving Washington after that meeting, I talked with Senator McCarran and Mr. Sumners and as a result, Mr. Sumners introduced the two Bills (H. R. 4232, 4233) on October 1, 1945, and Senator McCarran introduced them (S. 1451, 1452) on October 3. In these talks with Senator McCarran and Mr. Sumners, each requested that I prepare and forward a Statement

of the purposes of the Bills for the use of their several Committees.

Realizing that a Statement of that character to the members of Congress would, because of their general unfamiliarity with the problem, require something quite different from a statement to the Judges, I prepared what I hoped would be informative and useful to the Committees. This Statement was sent to Chief Justice Stone who suggested some changes therein. After meeting his approval, the Statement was sent to Senator McCarran and to Mr. Sumners. Here I wish to express my personal appreciation of the great assistance given me by Mr. Chandler, Mr. Whitehurst, and Mr. Shafroth in the assembly of material used therein. A copy of the Statement is attached hereto.

Late in March, Mr. Chandler ascertained that the Senate Committee had requested the Department of Justice to examine the Bills and state its reaction thereto and also that the Department had several serious objections to the jurisdictional Bills (S. 1451, H. R. 4233). The Department had no objection to the procedural Bills (S. 1452, H. R. 4232). Mr. Chandler took up this situation with Chief Justice Stone and it was determined to request from the Department a copy of its objections before the same had been cleared with the Bureau of the Budget and sent to the Senate Committee—the purpose being to see whether these objections might be obviated and opposition to the Bills from the Department avoided. The Department was entirely cooperative and, somewhat later, furnished Mr. Chandler with a copy of its objections. In consulta-

tion with Chief Justice Stone and Mr. Chandler, it was thought advisable for me to come to Washington and take up this matter with the representatives of the Department in the hope that the serious drawback of an adverse position by the Department might be prevented.

The early part of April, this year, I came on to Washington. I had several extended consultations with Mr. Bergson and Mr. Baynton of the Department regarding this matter. The result was that we finally reached entire agreement in principle. Mr. Bergson suggested the advisability of drafting a new jurisdictional Bill to be substituted for S. 1451 and H. R. 4233 instead of stating amendments which were thought to be proper to those Bills. During all of these proceedings, I kept Chief Justice Stone thoroughly informed and he made several suggestions, all of which were incorporated. Mr. Bergson and Mr. Baynton and myself drafted a substitute Bill which was approved by them and also by Chief Justice Stone who stated to me that he regarded it as better than the pending jurisdictional Bills. Chief Justice Stone and I thought this draft should be submitted to the members of the Judicial Conference before being presented to Senator McCarran and Mr. Sumners. However, with the approval of Chief Justice Stone, I told Senator McCarran and Mr. Sumners of the situation and that a draft had been made and would be submitted to them for their consideration if approved by the members of the Conference.

This draft was sent out promptly to the members of the Conference with an explanatory letter. All of the members of the Conference responded

except Judge Evans who, his secretary wrote me, was too ill to consider the matter. Some of the replies were a bit delayed so that all of the members had not been heard from until early in June. All approved except Judge Evans who was unable to respond. On June 7, this draft was sent to Senator McCarran and to Mr. Sumners with a request that it be considered as a substitute (agreed to by the members of the Conference and the Department of Justice) for the pending jurisdictional Bills. Mr. Sumners introduced this draft on June 10 (H. R. 6723).

The original House Bills and H. R. 6723 were referred to the House Judiciary Sub-committee Number 2, of which Mr. Weaver of North Carolina is Chairman. No action has been taken upon those Bills by the Sub-committee.

The Senate Judiciary Committee has considered the original Bills.

A related matter, to which I should call the attention of the members of the Conference, is that the Committee of the House on Revision of the Law, of which Mr. Keogh is Chairman, has been considering the matter of revising and codifying the "Judicial Code and Judiciary" and has prepared a draft of a Bill. Included therein is "CHAPTER 153.—HABEAS CORPUS." The Draft of this CHAPTER 153 covers the essential parts of the existing statutes governing habeas corpus and incorporates therein certain provisions contained in the above Bills now in Congress. In so far as matters not contained in existing statutes are included in this draft, those having to do with the jurisdictional Bills are in Sections 2254 and 2255. While similar in some respects, the pro-

visions in these two sections differ from all of the three jurisdictional Bills approved by the Conference.

Chief Justice Stone was fearful that any action taken by Mr. Keogh's Committee on the subject of habeas corpus in the fields covered by the Conference Bills might cause confusion and harm. On March 25, 1946, he wrote to Mr. Keogh a letter, the closing paragraph of which is as follows:

> I also call your attention to the fact that a committee of the Conference of Senior Circuit Judges, of which Judge Parker is chairman, and Judges Kimbrough Stone, Albert Lee Stephens, Underwood, Vaught and Wyzanski are members, was appointed some years ago to prepare a bill governing the use of habeas corpus in the federal courts. After considerable study of the subject the committee has prepared two bills which have been introduced in Congress. They are S. 1451 and S. 1452; H. R. 4232 and H. R. 4233. As these bills depart rather extensively from the provisions in the proposed revision, and as they will probably have the backing of the Judicial Conference, your committee may find it desirable to seek some way of avoiding having two committees of Congress working at cross-purposes in this field.

On April 29 I wrote to Mr. W. W. Barron as follows:

> I have your letter of April 25 with enclosed copy of your letter of that date to Judge Sanborn and your suggested redraft of Section 2255 in revision of Title 28.
>
> Two weeks ago I went to Washington, at the call of the Chief Justice, to attempt

to iron out some objections which the Department of Justice had raised to the jurisdictional Bill in regard to habeas corpus which had been approved by the Judicial Conference and introduced into the Senate and the House (S. 1451, H. R. 4233). After several conferences with representatives of the Department, we reached entire agreement, not only as to principle but as to the wording of a new draft to be introduced and to be a substitute for the present Bills. This draft was approved by the Chief Justice who thought it stronger than the present Bills. It is now under submission to the members of the Judicial Conference and, in so far as I have received replies, has been unreservedly approved. I think the draft will meet the approval of the Conference and it will then be introduced. Thereafter, hearings will be held by the Subcommittee and it is hoped that some action by Congress may result in the reasonably near future.

Chief Justice Stone was very much interested in this legislation. Also, he was quite apprehensive that there be no action by the Committee on Revision which would create any cross currents affecting this proposed legislation. If the Bills approved by the Conference should pass, I assume that would take care of the Revision in so far as the territory covered by those Bills is concerned.

My suggestion is that care be taken that no action of your Committee should confuse the present movement toward improvement in the features of habeas corpus covered by the Conference Bills.

These differences in the draft by Mr. Keogh's Committee and the drafts of jurisdictional Bills

approved by the Conference have created a situation which will require adjustment.

Since I understand that Judge Parker (who was Chairman of the Committee of the Conference which considered this matter) will shortly return, I suggest that it would be proper for the Conference to relieve me of further duties in this connection.

KIMBROUGH STONE.

SENATE BILLS NOS. 1451 AND 1452

Statement as to Necessity for and Purposes of the Bills

Generally speaking, the modern conception of habeas corpus is as a remedy to test the legality of the detention in custody of one person by another.[1] In United States Courts, the scope of the remedy is defined by statute[2] and has to do with confinements which are unlawful under the Constitution, treaties or laws of the Nation.

This scope (under present statutes) is very extensive and includes innumerable situations. Our concern here is with but *one* of these situations.

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[1] Chief Justice Stone, in *McNally v. Hill, Warden*, 293 U. S. 131, 136 (Nov., 1934), stated:

"Originating as a writ by which the superior courts of the common law and the chancellor sought to extend their jurisdiction at the expense of inferior or rival courts, it ultimately took form and survived as the writ of *habeas corpus ad subjiciendum*, by which the legality of the detention of one in the custody of another could be tested judicially."

[2] In 1807, the Supreme Court, by Chief Justice Marshall, stated: "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4 Cranch *75, *94.

That is where the confinement is solely under the sentence of a court (Federal or State) imposed in a criminal case upon a plea of guilty or upon a conviction on trial.[3]

It will be helpful to the Committee to have a statement (I) of the necessity for, and (II) of the purposes of the suggested legislation embodied in these two related Bills. This statement is addressed both to the Senate and to the House of Representatives Committees because identical Bills are pending in each of the two Houses.

I. THE NECESSITY

The necessity for legislation is the prevention of present burdensome abuses of the remedy of habeas corpus. The Congress has already enacted legislation to curb the abuse of Appeals in habeas corpus cases.[4] The present abuses have

[3] None of the large number of other situations is intended to be at all affected by these Bills. Among such other situations, frequently recurring, are: confinements connected with foreign extradition, extradition from one State to another, removal from one Federal District to another, deportation, violation of immigration Acts (general and Chinese), trial before military or naval tribunals, commitments under sentence of military or naval tribunals, contempt proceedings, commitment in contempt proceedings, and holding for trial in Federal or in State courts.

[4] No Appeal to the Supreme Court (Act of Feb. 13, 1925, 43 Stat. 936, 942, § 13; 28 U. S. C. A. § 347 (c)) where detention is under process issued out of a State court, no appeal allowed to Circuit Court of Appeals unless there is a certificate of "probable cause for such allowance" by trial judge or by a Circuit Judge (Act of Feb. 13, 1925; 43 Stat. 936, 940, § 6 (d); 28 U. S. C. A. §§ 463 and 466); no appeal allowed where detention is in removal proceedings (Act of June 29, 1938; 52 Stat. 1232; 28 U. S. C. A. § 463 (pocket parts p. 87)).

to do with *original* petitions in the Supreme Court, the District Courts and before Justices of the Supreme Court, Circuit and District Judges.

Under existing law, the Supreme Court and the District Courts have power to issue the writ (28 U. S. C. A. § 451); also, the individual Justices of the Supreme Court and all Circuit and District Judges, within their respective jurisdictions, have like power (28 U. S. C. A. § 452). Since there is no statutory limitation to the number of successive petitions which may be filed by the same person and since *res judicata* does not apply in habeas corpus proceedings (*Waley* v. *Johnston*, 316 U. S. 101, 105 (1942)), the same prisoner may file successive petitions, innumerable times, in the Supreme Court, in the proper District Court, before each of the Justices of the Supreme Court, before each of the Circuit Judges of the Circuit within which he is confined, and before each of the District Judges (if there be more than one) in the District where confined. He may file such petitions before the same Court or Justice or Judge as many times as he wishes or he may "shop around" from Court to Court and from Justice to Justice and from Judge to Judge.

Since release is sought from commitment after sentence under a criminal charge, the grounds stated in any of these petitions are necessarily confined to alleged unlawful actions in connection with the indictment, the trial, the sentence or the manner or place of executing the sentence under which petitioner is confined. Since these grounds usually have to do with past happenings, it is

very rare that a petitioner does not state, or does not have the knowledge from which he could state, in his *first* petition all of the grounds he may ever have. The result of this is that the same petition, in substance, may be and is filed again and again before the same or different Courts, Justices or Judges.

All of this creates a strange and anomalous situation as follows:

(1) A man is indicted, pleads guilty and is sentenced; or he is tried and convicted and sentenced. Throughout that entire proceeding—up to pronouncement of sentence—he may present any reasons (of law or fact) to meet the charge against him. Throughout this entire proceeding, up to sentence, he is protected by the presumption of innocence; and he must be proven guilty either by his own plea or by evidence which shows guilty beyond a reasonable doubt. After conviction, he has a right to appeal to a Circuit Court of Appeals to test the fairness of his trial, with a further right to apply to the Supreme Court for certiorari from an unfavorable decision in the Court of Appeals. The sole purpose of this appellate procedure is to insure that, before he is punished, he shall have one fair trial but he is allowed *only one* fair trial before punishment.

(2) After he has tested, or had the opportunity to test, the fairness of his conviction as above he goes to prison. His presumption of innocence has been overcome by guilty plea or conviction on trial and he is then presumed to be guilty and to have had a fair trial. Nevertheless, he can then file a petition for habeas corpus to test the validity of that very conviction. Out of a solici-

tude to protect the liberty of even a confessed or convicted person, it is entirely proper to allow him this further test of the proceedings resulting in his confinement. The strange anomaly is that, while he (presumably innocent) can have but one fair trial for the crime, he can, after conviction (then presumably guilty) have as many habeas corpus proceedings as he may desire with again the same rights of appeal (except where under State sentence) and of certiorari in each such proceeding as he had when tried for the crime. Also, that each of these habeas corpus proceedings may be based on the same grounds.

Anomalous and unnecessary as this right to file repeated petitions in habeas corpus seems, the attention of The Congress would not now be drawn to it except for a situation which has arisen and developed in the last few years.[5] This situation has resulted in a flood of habeas corpus petitions—a substantial number being repetitions—which has seriously interfered with the other work of various busy courts and judges.[6]

[5] Earlier abuses of the writ have not been lacking (see *Storti* v. *Massachusetts*, 183 U. S. 138, 141 (1901), but the extent of abuse has never approached the present proportions.

[6] The attached Tables I and II are informative as to the extent and increase of recent filings of habeas-corpus petitions; as to repetitious filings by the same petitioners; and as to the increase of groundless petitions. Table I covers these matters in the Supreme Court and Table II in the District Courts.

These Tables do not include the District of Columbia, as to which see *Dorsey* v. *Gill* (Feb. 1945), 148 F. 2d 857, 862, footnote 7. As to repetitious filings in the District of Columbia, the *Dorsey* opinion, at page 862, states: "Here, petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also

Experience has demonstrated the utter futility of nearly all of these recent petitions, as well as the insincerity of many of them. This is true even where the prisoner has filed but one petition. The instances in which discharge has occurred on a subsequent petition are practically nil.

The situation causing this serious influx of habeas corpus cases in recent years arose as follows. For more than one hundred years, the decisions of the Supreme Court have many times stated the general rule that, in United States Courts, habeas corpus cannot perform the function—directly or indirectly—of a writ of error or an appeal. The division line has been and is between error (correctable by writ of error or appeal) and violations of constitutional right which do not appear of record and thus can be raised on habeas corpus. The crux was and is in determining this line in a given case.[7] While

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as a device for harassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions—an average of 5."

[7] In *United States* v. *Pridgeon*, 153 U. S. 48, 63 (1894), the Court stated:

"We have not deemed it necessary to review or to attempt to reconcile the authorities on the question, for the reason that while all concede that neither irregularities nor error, so far as they were within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus—because a writ of habeas corpus cannot be made to perform the functions of a writ of error in relation to proceedings of a court within its jurisdiction—they differ widely as to what constitutes error,

it is interesting to trace the changes, trends and developments in the decisions of the Supreme Court as to what has been regarded as subject to examination for habeas corpus purposes, that is not here necessary. Our present purposes require only the fully supported statement that the scope of examination for habeas corpus purposes in testing confinement under Court sentence has been very greatly extended by recent decisions of the Supreme Court—both as to matters within the trial record (or which might have been raised on the trial)[8] and as to matters dehors the record.[9] While a few earlier cases had some effect, yet the line of cases here in mind began with *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and was accelerated in effect by subsequent decisions—perhaps

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and what should be regarded as rendering the judgment or proceedings void."

[8] In addition, it should be stated that there is a recent expression of the Supreme Court which may mean an extension of the remedy beyond jurisdictional issues. In *Waley* v. *Johnston*, 316 U. S. 101, 104 (1942), the Court stated: "The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Bowen* v. *Johnston*, 306 U. S. 19, 24." This is approvingly quoted in *House* v. *Mayo*, 324 U. S. 42, 46 (1945).

[9] For an example, compare *Riddle* v. *Dyche*, 262 U. S. 333 (1923), with *Mooney* v. *Holohan*, 294 U. S. 103 (1935).

particularly *Bowen* v. *Johnston*, 306 U. S. 19 (1939); *Walker* v. *Johnston*, 312 U. S. 275 (1941); *Holiday* v. *Johnston*, 313 U. S. 342 (1941); *Waley* v. *Johnston*, 316 U. S. 101 (1942); *House* v. *Mayo*, 324 U. S. 42 (1945); and *White* v. *Ragen*, 324 U. S. 760 (1945). Such extention has been one of the main causes for the present situation.

Another cause is that recent decisions have added substantially to the adjudicated matters of fact dehors the record which will invalidate conviction.

Other related and contributing causes are recent decisions of the Supreme Court which have lessened the influence of the presumption of regularity carried by the conviction judgment when attacked collaterally; and those which have further defined the requisites at the "hearing" on habeas corpus required by the statute (28 U. S. C. A. § 461). Under present decisions; if a habeas corpus petition states facts which, if true, would warrant discharge of petitioner, such statement must be taken as true unless denied by respondent. If so denied, an issue of fact is raised. Such issue must be tried on testimony before the court as in ordinary cases (*Walker* v. *Johnston*, 312 U. S. 275, 284–286 (1941)) and cannot, under the statute, be tried on affidavits (same citation) nor heard before a Commissioner (*Holiday* v. *Johnston*, 313 U. S. 342, 350–354 (1941)). While the presumption of regularity attaches to the conviction court judgment, yet it is confined to casting a decided burden of proof upon petitioner—who, in any kind of case as plaintiff, would have the burden of proving his case.

Also, special situations have arisen in the procedure in certain States Courts which, in the light of recent Supreme Court decisions, have resulted in additional habeas corpus cases—particularly in the Supreme Court. Such a situation in Illinois is set forth in *White* v. *Ragen*, 324 U. S. 760, 762 footnote 1 (1945).

Since the prisoner has now a right to testify—to be present—at the hearing (*Holiday* v. *Johnston*, 313 U. S. 342, 353–354 (1941)) and since he usually can proceed without expense to himself (*in forma pauperis*), very many prisoners have taken advantage of the situation. They had nothing to lose; might possibly gain a discharge; and certainly would have a trip out of prison. All they had to do was to draw up a petition alleging one or more of the matters of fact which the courts have held would invalidate a conviction.[10]

Thus a series of good decisions designed to protect sentenced prisoners from unlawful confinements has been improperly taken advantage of by them. Thus they have created the present situation of abuse of the writ to the extent that

[10] Without attempting a comprehensive list, it may be useful to set out a few of the more common grounds alleged in these habeas corpus petitions in order to indicate the character and range thereof. Such are: denial of counsel, insufficiency of representation by counsel, denial of opportunity to prepare defense, improperly induced to plead guilty, not correctly apprised of charge against him, denied compulsory process to procure witnesses, perjured testimony induced by prosecution, suppression (by prosecutor) of evidence showing innocence, and coerced confession.

it now seems to require remedy. Any remedy must come from the Congress.[2]

These Bills represent the suggestions of the Judicial Conference to the Congress for legislation which, it is believed, will afford the needed relief.

II. EXPLANATION OF THE BILLS

One of the Bills in each House (S. 1451, H. R. 4233), is Jurisdictional. The other (S. 1452, H. R. 4232) is Procedural.

The Jurisdictional Bill

This Bill has two sections. The first section is concerned solely with imprisonment under State court sentence; the second section concerns imprisonment solely under Federal court sentence. The legal and practical considerations for a different approach, in Federal court habeas corpus proceedings, to sentences in State courts and to sentences in Federal courts is evident and has been long recognized by the Congress and the Courts.[11]

SECTION 1. The broad effect of this section is to require that collateral attacks upon the validity of confinements on sentences of State courts, because alleged to be in violation of the Constitu-

[2] In 1807, the Supreme Court, by Chief Justice Marshall, stated: "the power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte Bollman*, 4 *Cranch* *75, *94.

[11] The Judiciary Act of 1789, 1 Stat. 73, 81, § 14, expressly limited the remedy to Federal confinements and was not extended to the States in any respect until the Act of 1833 (4 Stat. 632, 634, § 7).

tion, treaties or law of the Nation, shall be determined in State courts with power in the Supreme Court of the United States to review on certiorari. Apparently, the only instances in which such procedure might be inadequate are (1) where a State has no efficient remedy or (2) where the State remedies (though adequate generally) are insufficient to protect the rights of the prisoner in some particular instance because of the existence of "exceptional circumstances." The broad phrase "exceptional circumstances" is intended to cover situations peculiar to the particular case—such as mob interference, strong adverse public sentiment, et cetera.

In both of these two instances of State procedure inadequacy, original jurisdiction is retained in the United States courts to be exercised as follows: *first*, a petition for habeas corpus may be filed before any Circuit or District Judge (within the Circuit or District where the petitioner is confined) whose duty is promptly to determine whether there is reasonable ground to believe that an adequate State remedy is lacking or whether any "exceptional circumstance" exist; *second*, if such judge determines adversely to petitioner, an appeal is given to the proper Court of Appeals; *third*, if such judge determines in favor of the petitioner, the writ is issued and a statutory court of three judges is constituted to try the case; *fourth*, a right to apply direct to the Supreme Court for certiorari to review the determination of the statutory Court.

It is believed that the section provides complete protection to State prisoners; will prevent conflicts between State and lower Federal courts

in all but exceptional situations; and, even in such situations, will provide a special Federal Court so constituted as to minimize State irritation.[12]

SECTION 2. This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant has been convicted. The remedy is in the nature of, but much broader than, *coram nobis*.[13] The motion remedy broadly covers all situations where the sentence is "open to collateral attack." As a remedy, it is intended to be as broad as habeas corpus. However, to take care of situations where, for practical reasons it is not advisable to remove a petitioner from prison and to be certain that the remedies afforded prisoners will be fully sufficient, the section goes further then prescribing the motion remedy. In these exceptional instances where it may seem that the motion remedy is not practicable, because of the prisoner's "inability to be present

[12] The unseemliness of a single Federal judge setting at liberty a person convicted by a State court is noted in *Ex parte Royall*, 117 U. S. 241, 253 (1886).

[13] "The writ of coram nobis or coram vobis was a common law writ, the purpose of which was to correct a judgment for errors of fact in the same court in which it was rendered" (3 Am. Jur. 766, § 1276). This remedy, in so far as it might have been usable, has been succeeded (in United States courts) by a motion (*Wetmore* v. *Kurrick*, 205 U. S. 141, 151 (1907)). For examples of the use of coram nobis in State courts in criminal cases, see *Ernst* v. *Wisconsin*, 179 Wis. 646, 192 N. W. 65, 30 A. L. R. 681 and note; *Alexander* v. *State*, 20 Wyo. 241, 123 Pac. 68; *State* v. *Calhoun*, 50 Kan. 523, 32 Pac. 38; *People* v. *Perez*, 9 Cal. App. 265, 98 Pac. 870; *Sanders* v. *State*, 85 Ind. 314; *State* v. *Richardson*, 291 Mo. 566, 237 S. W. 765.

at the hearing on the motion, or for other reasons," habeas corpus is made available. It will be noted that there is provided a wide discretion in the use of habeas corpus where, "for other reasons," the motion remedy seems not "practicable." This will take care of any exceptional practical situation which may arise in any particular case.

The two main advantages of such motion remedy over the present habeas corpus are as follows: *First,* habeas corpus is a separate civil action and not a further step in the criminal case in which petitioner is sentenced (Ex parte *Tom Tong,* 108 U. S. 556, 559 (1883)). It is not a determination of guilt or innocence of the charge upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, it is usually because some right—such as lack of counsel—has been denied which reflects no determination of his guilt or innocence but affects solely the fairness of his earlier criminal trial. Even under the broad power in the statute "to dispose of the party as law and justice require" (28 U. S. C. A. § 461), the Court or Judge is by no means in the same advantageous position in habeas corpus to do justice as would be so if the matter were determined in the criminal proceeding (see Medley petitioner, 134 U. S. 160, 174 (1890)). For instance, the judge (by habeas corpus) cannot grant a new trial in the criminal case. Since the motion remedy is in the criminal proceeding, this section 2 affords the opportunity and expressly gives the broad powers to set aside the judgment and to "discharge the prisoner or

resentence him or grant a new trial or correct the sentence as may appear appropriate."

Second. Most habeas corpus cases raise fact issues involving the trial occurrences or the alleged actions of judges, United States attorneys, marshals or other court officials. Obviously, it involves interruption of judicial duties if the trial judge, the United States attorney, the court clerk or the marshal (one or all of them) are required to attend the habeas corpus hearing as witnesses. Such attendance is sometimes necessary to refute particular testimony which the prisoner may give and, obviously, such attendance is the safest course. This is so because experience has demonstrated that often petitioner will testify to anything he may think useful, however false; and, without the witnesses present to refute such, he is encouraged to do so and may make out a case for discharge from merited punishment. Some realization of the possible extent of this burden on Court officials may be gained from the bare statement that, while convictions occur in all of the Districts throughout the country, federal prisoners are confined in a very small number of penal institutions; and habeas corpus must now be brought in the District where the petitioner is confined. Even if the testimony of these officials is taken by deposition, the interference and interruption is merely lessened in degree and the above danger is risked.

The main disadvantages of the motion remedy are as follows: The risk during or the expense of transporting the prisoner to the District where he was convicted; and the incentive to file base-

less motions in order to have a "joy ride" away from the prison at Government expense.

Balancing these, as well as less important, considerations, the Conference is of opinion that the advantages outweigh and that the motion remedy is preferable. As to the risk (escape or delivery) while transporting the prisoner to the District of conviction, the difference is only one of degree—of distance and, therefore, of opportunity. As to the expense, it is highly probable that it would be more expensive for the Government witnesses to go from the District where sentence was imposed and return than for the prisoner to be brought to such District and returned. As to the incentive to file petitions, the difference is between a longer and a shorter trip to the Court. It is thought that the provision in Section 2 providing for habeas corpus (in the District of confinement) where it is not "practicable to determine his rights * * * on such a motion" will furnish a sufficient discretion in the judge or court before whom habeas corpus is filed to evaluate and defeat the above "disadvantages" to a large degree.

Other provisions of the section are merely implementing or supplemental to the above outlined purposes and are self-explanatory.

The Procedural Bill

This Bill contains seven sections confined to different features of procedure which experience seems to show are necessary or useful.

SECTION 1: This section is intended to accomplish four things: (1) to prevent "shopping around" from court to court and from judge to

judge, or repeated petitions (on the same grounds) to the same court or judge; (2) to compel petitioner to state in his petition all of the grounds for the writ then known to him; (3) to afford unlimited opportunity to present any grounds which petitioner may thereafter discover at any time; (4) to afford unlimited opportunity to apply for rehearing even upon petitions theretofore presented.

As to the first purpose, the necessity therefor has been sufficiently outlined hereinbefore. It may be added that the Congress, in one instance, has already confined habeas corpus to one petition upon the same grounds (The Act of June 6, 1900, "making further provision for a civil government for Alaska," 31 Stat. 321, 429, § 608).

The second purpose is self-explanatory and would seem to require no elaboration. Also see *Wong Doo* v. *United States,* 265 U. S. 239, 241 (1924).

The third purpose is brought about by allowing presentation of a subsequent petition based upon "new" grounds "not theretofore presented and determined."

The fourth purpose is accomplished by allowing a "rehearing", without time limit, for presentation not only of any fact situation discovered after the first trial or any subsequent applicable change in law (statutory or decision) which might have affected the first determination; but also any grounds presented by the first petition.

Thus, the fullest rights of the prisoner are preserved and, at the same time, repetitious petitions and hearings are lessened.

SECTION 2. The purpose of this section is to

afford an opportunity to avoid interruption of the sentencing judge's work from having to attend the habeas corpus trial or having his deposition taken.

SECTION 3. The purpose of this section is to facilitate the taking of evidence by permitting the use of affidavits with proper safeguards.

SECTION 4. The purpose of this section is to make admissible evidence taken in prior habeas corpus proceedings by the same petitioner.

SECTION 5. The purposes of this section are to relieve petitioner from the binding effect of an untraversed return, which he may have inadvertently failed to deny; and to give to the answer to a notice to show cause the same evidentiary effect as a return to the writ.

SECTION 6. The purpose of this section is to make material portions of records of conviction readily available to the court.

SECTION 7. The purpose of this section is to enable a pauper petitioner to obtain such portions of the records on conviction as may be pertinent to his habeas corpus case.

CONCLUSION

The endeavor here is to set forth the necessity for Congressional action and the reasons for the specific legislation which the Judicial Conference suggests will meet the situation. There can be little room for doubt that such necessity exists. This Statement is respectfully submitted with an expression of our desire to be of any further aid to the Committees on the Judiciary which they may indicate.

TABLE I.—*Supreme Court*

Number of petitions—original (for leave to file) and certiorari—filed and granted in each of the October Terms for 1942, 1943, and 1944, that is, from October 1942 to October 1945.

	1942		1943		1944	
	Filed	Granted	Filed	Granted	Filed	Granted
Original	83	0	105	0	100	0
Certiorari	74	2	134	3	216	4
Total	157	2	239	3	316	4

This Table shows a total of 712 petitions in the last three years, of which 9 were granted. Of the 9 granted, all were on certiorari. Of these 9, the disposition by the Supreme Court was as follows: 4 were vacated and remanded; 4 were reversed and remanded; and 1 was dismissed.

Of the 288 "Original" petitions, 69 were filed by 28 persons who filed more than one original petition *before the Supreme Court* during these three years. Of these 28 persons, 19 filed two such petitions each; 6 filed three each; 2 filed four each; and 1 filed five petitions.

While a complete study has not been attempted because of difficulties of identification, yet there is some information as to the number of petitions filed in the District Courts *by these "repeaters" in the Supreme Court*. This shows, what is not unusual, that 5 of such petitioners each filed also 3 petitions in the District Courts; 4 filed 4 such petitions; 1 filed 5 such petitions; 1 filed 6 such petitions; and 1 filed 11 such petitions.

TABLE II.—*District Courts*

Total Petitions filed for two years (1936 & 1937)		620	Annual Average	310
" " " " three. "	(1943, 1944 & 1945)	2536	" "	845
" Releases. " two "	(1936 & 1937)	45	" "	22
" " " three "	(1943, 1944 & 1945)	77	" "	26

Percentage of releases to petitions:

Annual Average for 1936 and 1937 is .073%.

" " " 1943, 1944 & 1945 is .030%.

This table does not include the District of Columbia.

The particular years were selected for the purpose of showing trends. The years 1936 and 1937 immediately preceded *Johnston v. Zerbst*, decided May 1938, while the three years (1943–5) bring the data up to date.

The increase in number of petitions and the relative decrease in percentage of releases are indicative of two things: the growing increase of the burden upon the courts and the growing worthlessness of the cases.

Repeaters. During the three years (1943, 1944 and 1945) 179 petitioners filed 2 petitions; 70 filed 3 petitions; 25 filed 4 petitions; 2 filed 5 petitions; 5 filed 6 petitions; 1 filed 7 petitions; 1 filed 9 petitions; and 1 filed 11 petitions. Practically all releases were upon the first petition—thus indicating the harassment of busy courts and judges by repeated filing of worthless cases.

E. REPORT OF THE HABEAS CORPUS COMMITTEE SUBMITTED AT THE 1947 SPECIAL SESSION OF THE CONFERENCE

Report of Habeas Corpus Committee

To the Chief Justice of the United States and the Judicial Conference of Senior Circuit Judges:

The Committee on Habeas Corpus Procedure, to which the Conference referred the "jurisdictional bill," H. R. 6723 79th Congress 2d Session, for further consideration and action, met pursuant to the call of the Chairman in the Supreme Court Building in Washington, D. C., on Monday, December 16, 1946, with all members of the Committee present except Judge Kimbrough Stone, whose attendance was prevented by the illness of his wife. Also in attendance were Judge Maris of the Third Circuit, Judge Holtzoff of the District of Columbia, Messrs. Whitehurst and Shafroth of the Administrative Office, and Messrs. Bergson and Bainton of the Department of Justice.

The Committee first gave consideration to the one year limitation provision, which is not contained in the original bill as approved by the Conference. The Committee was of opinion that it was neither feasible nor desirable to include this limitation in the bill. Habeas corpus can be availed of for the release of one imprisoned under the judgment of a court only if the judgment is void; and, if the judgment is void, no time limitation should be asserted against the release of one improperly deprived of his liberty under it. This is true, whether the invalidity

of the judgment results from the fact that the court has transcended its jurisdiction, or from the fact that it has lost jurisdiction through disregard of constitutional limitations. Representatives of the Department of Justice, who had originally insisted upon the limitation, withdrew support of it and concurred in the views of the Committee.

The Committee next gave consideration to the provision contained in the original bill for a special court of three judges to hear cases involving the validity of the judgment of a state court, where the application for habeas corpus is found by a District Judge to be meritorious. The Committee was of opinion that this provision should be restored. It is a serious matter to permit a court of the United States to try the proceedings had in a state court and hold them for naught, especially, as is frequently the case, where the proceedings of the state court have been approved and confirmed by the highest court of the state. Such setting aside of state action is certainly no less serious than the setting aside of a state statute or the action of a state administrative board, as to which action by three judges is required. To constitute a court of three judges for the hearing of such matters provides a fact finding court of a standing comparable to that of a Circuit Court of Appeals; and direct review by the Supreme Court obviates delay and gives direct control over the proceedings to the only federal court whose review of state court action has historical basis.

It should not be overlooked in this connection that not until recently was it possible for proceed-

ings in a state court to be reviewed by any federal court except the Supreme Court of the United States, where review was by appeal, writ of error or certiorari. The expansion of the habeas corpus remedy under recent decisions, however, has made it possible for a federal District Court to try the proceedings of the state court on matters dehors the record; and cases have arisen in which the judge of a state court and lawyers who participated in a trial before him have been haled into the federal court and examined as witnesses as to the regularity and propriety of the state court proceedings. It is the view of the Committee that, when power of this sort is exercised, a court of three judges should be convened to insure, on the one hand, that the power of the state courts shall not be infringed or belittled and; on the other, that prompt relief may be afforded in proper cases.

In order that the courts may not be unduly harassed by the necessity of convening three judges to hear frivolous applications, the bill provides that, if the judge before whom the application is filed, shall determine that no reasonable ground exists for the issuance of the writ, he shall dismiss the petition, and that appeal from this action shall lie to the Circuit Court of Appeals, and not to the Supreme Court. It is believed that most of the groundless petitions with which the courts have been harassed in recent years could be disposed of under this provision, and that only in rare instances would it be necessary to convene a court of three judges. The machinery, however, would always be available to deal with any meritorious case that might arise.

Fear has been expressed that the provision for direct review of the three judge court by the Supreme Court will increase the labors of the latter court; but it is believed that this fear is not well founded. It will be observed that the review provided is by certiorari; and the Supreme Court by denying the writ can protect itself against reviews which are groundless with no more labor than is involved in considering such applications under the present system. The thought occurs that if this legislation were adopted, the Supreme Court would find in its provisions a solution of the difficulty presented by the increasing number of applications for habeas corpus made to it directly by persons imprisoned under judgments of state courts. With this machinery for the proper hearing of evidence and apprisal of facts, the court might well require that all applications for habeas corpus assailing the validity of state court judgments be handled through it, so that a proper record might be made before the case was brought to hearing in the Supreme Court. This would relieve the Supreme Court of the burden of hearing a multitude of groundless applications and would not impair the power of the Court to exercise original jurisdiction in those rare and exceptional cases which call for its exercise.

Your Committee has accordingly redrafted H. R. 4233 of the 79th Congress 1st Session, the bill originally approved by the Conference, with certain verbal changes which are thought to make its meaning clearer, and submits it with the recommendation that it be approved by the Conference and that its passage be recommended to Congress. Your Committee deems it unnecessary to repeat

what has already been said with respect to the desirability of the enactment of legislation embodying the second section of the act, the purpose of which is to require that attacks by a prisoner upon a judgment under which he is held in custody, be made if possible, in the sentencing court and not in the court of the district where he is imprisoned, so as to avoid the unseemly procedure of one district court's being required to try the procedure of another district court upon the mere application of one who has been convicted of crime by the latter.

While the Conference did not re-refer to the Committee the procedural bill approved by the Conference, H. R. 4232, 79th Congress 1st Session, the Committee thought it not improper to give consideration to its provisions. The Committee again approves the bill, except that three members of the Committee, Judges Stephens, Underwood and Wyzanski, think that the language immediately following the enacting clause should be "That no Circuit or District Judge shall *be required to* entertain" etc., instead of "shall entertain" etc., as at present contained in the bill. Their view is that the act should make the entertaining of subsequent petitions for habeas corpus discretionary with the judge instead of establishing the rule of res judicata to the extent proposed by the bill. These judges are attaching to t report a memorandum of their views in regard to this matter and Judge Stephens, who expects to attend the next meeting of the Conference, will, in addition, state his views orally to the Conference.

Attached hereto are copies both of the jurisdictional bill as approved by the Committee and the

procedural bill as approved by the Conference, as to which the Committee as a whole suggests no changes but three members of the Committee propose the change above outlined.

JOHN J. PARKER, *Chairman.*
ALBERT LEE STEPHENS.
E. MARVIN UNDERWOOD.
EDGAR S. VAUGHT.
CHAS. E. WYZANSKI, JR.

The report is not signed by Judge Kimbrough Stone.

MARCH 1, 1947.

A BILL To regulate the review of judgments of conviction in certain criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity under the Constitution, treaties or laws of the United States of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceedings, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. Where a prisoner in custody pursuant to a conviction of a court of any State, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a State court by habeas corpus, writ of error coram nobis, or otherwise files a petition for writ

of habeas corpus before any circuit or district judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue the writ and shall cause a district court of three judges to be constituted as provided by section 266 of the Judicial Code, as amended (28 U. S. C. 380a), who shall constitute a court for the hearing of such petition. The decision of such court shall be reviewable by the Supreme Court of the United States on writ of certiorari. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing it, he shall dismiss the petition from which action an appeal shall lie to the circuit court of appeals for the circuit, upon the filing of the certificate required by the Act of March 10, 1908 (ch. 76), entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, as amended" (35 Stat. 40, 28 U. S. C. 466). The phrase "no adequate remedy" as used in this section means absence of State corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the prisoner.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution, treaties or laws of the United States, or that the court was without jurisdiction, or that the sentence was not authorized by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered,

to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Unless the court shall determine that the motion on its face presents no ground for the relief sought, it shall thereupon cause notice of the motion to be served upon the United States Attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted

as a defense to the prisoner's application for relief on habeas corpus. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

A BILL To regulate habeas corpus proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge shall entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time, and, if the judge dies, goes out of office, or becomes disabled, a rehearing may be granted by his successor, or by the judge designated to hear the matter in the event of his disability. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

SEC. 2. On a hearing of an application for a

writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment of any court of the United States or of any State, the certificate of the judge who presided at the trial resulting in the judgment of conviction, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

SEC. 3. On an application for a writ of habeas corpus, evidence may be taken orally or by deposition, and, in the discretion of the judge, by affidavit. If the evidence is presented in whole or in part by affidavit, any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

SEC. 4. On an application for a writ of habeas corpus documentary evidence and the transcript, if any, of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

SEC. 5. The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceedings, if not traversed, shall be accepted as true except to the extent that the judge shall find from the evidence that they are not true.

SEC. 6. On an application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them

as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

SEC. 7. If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

REPORT OF JUDGES STEPHENS, UNDERWOOD AND WYZANSKI WITH REFERENCE TO PROCEDURAL BILL

To The Chief Justice And The Senior Circuit Judges In Conference:

The main report of our committee correctly states that the undersigned members of the committee are not in favor of that part of H. R. 4232, which applies the doctrine of res judicata to proceedings for the writ of habeas corpus. We think the long line of decisions, announcing the rule that res judicata does not apply to petitions for habeas corpus, should not be legislated out of the law. Even the quite aggravating and indefensible practice of "peddling" unmeritorious petitions of the same content around to different judges, after adverse rulings, does not afford a sufficient reason for irretrievably shutting off this historic writ of freedom with one court decision. Unjust and illegal imprisonment, by decree of court, despotic rulers, committees of citizens,

or by scheming individuals, has been and continues to be a prime unatonable crime of man, causing unjust suffering and tragedy. No trouble or inconvenience to officials of our government, or cost to it, can justify the withdrawal of the right to a free, open and adequate official investigation into an imprisonment where the prisoner or someone for him asserts, as facts, statements which, if true, would establish its illegality. We venture to assert that there is no duty of a judge that transcends in importance the entertainment of the writ of habeas corpus.

The legislation proposed by the committee and known as H. R. 4232 limits the right to have any petition for the writ considered if the ground therein alleged as good cause has been once passed upon. That a judge may have erred and the prisoner may have overlooked his right of appeal or have been held in circumstances which have prevented his appeal makes no difference. That the writ may have been denied for the lack of proof and a witness to supply the lack becomes available perhaps years later makes no difference. A corrupt, vindictive or vicious man, a callous jailor, a careless or erring judge, a thousand combinations of circumstances, may cause the one and only petition allowable to fail. We refer to the case of *Johnston* v. *Wright*, 137 Fed. 2d 914, cert. denied U. S. Sup. Ct. Bull. V. 7, No. 11, Jan. 6, 1947, in which the prisoner's contention was sustained only upon the fourth repetitious petition filed. See *Kessler* v. *Strecker*, 307 U. S. 22, 25, 26.

We very earnestly believe that the bill, as it stands, is wrong and not within the spirit of the

constitutional provision that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

We apprehend that if the bill in its present form becomes a law, judges will find it necessary to whittle away at it in many ways in order to prevent instances of great and obvious injustice. This practice is always an unwelcome duty to the judge, and many injustices will result before judicial interpretation robs the law of its threat to corrective justice. There is another angle to the question. The writ of habeas corpus is an ever-present warning to those who would unjustly, by intention or by carelessness, deprive a person of his liberty. Everyone knows that courts are always ready to throw their full power into an inquisition as to the legality of an imprisonment; such potential action is a deterrent which never can be measured.

While we unqualifiedly favor all parts of the bill, except Section 1 thereof, to which the above exclusively refers, we doubt the urgency or desirability of any limiting legislation for the reason that authoritative decisions have already pointed the way to prevent abuses of the writ of habeas corpus. In *United States ex rel. McCann v. Thompson* (Cir. 2), 144 Fed. 2d 604, 606, we find the following:

> While it is quite true that an order dismissing one writ of habeas corpus does not formally estop the relator from suing out another on the same grounds, that does not mean that he may again and again call upon the court to repeat its rulings.

> Even this great writ can be abused, and when the question has once been decided upon full consideration, there must be an end, else the court becomes the puppet of any pertinacious convict. *Salinger, Jr.* v. *Loisel, United States Marshal*, 265 U. S. 224, 44 S. Ct. 519, 68 L. Ed. 989; *United States ex rel. Bergodoll* v. *Drum*, 2 Cir., 107 F. 2d 897, 129 A. L. R. 1165. We refuse therefore to take up the second question upon this appeal.

See also, *United States ex rel. Kulick* v. *Kennedy, Warden*, 157 Fed. 2d 811, 813. It was said in *Swihart* v. *Johnston*, 150 Fed. 2d 721, 722 (Cir. 9), that:

> Although the doctrine of res judicata does not apply to a judgment refusing to discharge a prisoner on habeas corpus, it does not follow that a refusal to discharge on one petition is without bearing or weight when a later petition is being considered. Each petition is to be disposed of in the exercise of a sound judicial discretion guided and controlled by whatever has a rational bearing on the propriety of the discharge sought. One of the matters which may be considered and given controlling weight is a prior refusal to discharge on a like petition.

Cert. denied in 66 S. Ct. 803. Many citations from the United States Supreme Court and the circuits are added in the notes to this opinion.

We respectfully submit that the bill goes much too far. We propose that the conference of senior judges, if it sees fit to recommend its passage, do so only after the changes are made which we here propose. For ready reference,

we quote Section 1 of the bill as it is printed. We have, however, indicated where deletions are recommended by drawing a line through the text, and we have underlined all suggested additions.

A BILL To regulate habeas corpus proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge ~~shall~~ *or district court shall be required to* entertain any application for a writ of habeas corpus to inquire into the detention of any person ~~pursuant to a judgment of any court of the United States or of any State~~ if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for ~~a~~ *any* writ of habeas corpus and the petition presents no new ground not theretofore presented and determined *and the judge or court is satisfied that the ends of justice will not be served by such entertainment.* A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. ~~The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time, and, if the judge dies, goes out of office, or becomes disabled, a rehearing may be granted by his successor, or by the judge designated to hear the matter in the event of his disability.~~ The term "circuit judge" as used herein shall be deemed to include the judges of

the United States Court of Appeals for the District of Columbia.

ALBERT LEE STEPHENS,
United States Circuit Judge.
E. MARVIN UNDERWOOD,
United States District Judge.
CHARLES E. WYZANSKI, Jr.,
United States District Judge.

FEB. 20, 1947.

E. LETTER TO ALL CIRCUIT AND DISTRICT JUDGES

MAY 2, 1947.

To United States Circuit Judges,
United States District Judges:

Pursuant to action of the Judicial Conference of Senior Circuit Judges at its recent special meeting held April 21 and 22, 1947, I herewith transmit for your consideration and comment, two proposed bills designated "A" and "B" in reference to habeas corpus procedure, which have received the approval of the committee of the Judicial Conference on that subject, "A" being commonly referred to as "the jurisdictional bill" and "B" as "the procedural bill". I inclose also a report concerning the bills by Circuit Judge John J. Parker, chairman of the committee of the Conference and another jurisdictional bill designated as "X", differing from "A" and referred to in the report of Judge Parker.

The committee and the Judicial Conference will be glad to have an expression of your views in regard to the proposed legislation. Letters on the subject may be sent to Mr. Will Shafroth of this office who is acting as secretary of the

committee and who will bring them to the attention of the committee and the Judicial Conference. It is also requested that the measures be considered by the legislative committees and the judicial conferences of the various circuits, and that expressions of the conferences be reported to Mr. Shafroth so that when the Judicial Conference of Senior Circuit Judges meets in the fall, it will be advised of the opinions of the judicial conferences in the circuits as well as of the individual judges.

It will be a convenience if letters on the subject to Mr. Shafroth may be sent in duplicate.

Sincerely yours,

HENRY P. CHANDLER.

MEMORANDUM BY JUDGE PARKER

Proposed Legislation Relating to Habeas Corpus

This memorandum is prepared to be sent by the Administrative Office with two proposed bills which have received the approval of the Committee on Habeas Corpus, and which the Judicial Conference of Senior Circuit Judges has ordered sent out to the Circuit and District Judges of the Country in accordance with its plan for the consideration of proposed legislation. The bills relate to applications for habeas corpus in the limited class of cases in which the petitioner is imprisoned under the judgment of a state or federal court. One relates to jurisdiction in such cases and is attached hereto marked "Statute A"; the other relates to procedure and is attached hereto marked "Statute B".

There is some history back of the proposed

legislation. Following decisions of the Supreme Court, which permitted persons accused of crime to attack the proceedings under which they were convicted by mere allegation in habeas corpus proceedings of denial of constitutional rights and to support such allegations by proof of matters dehors the record, there was a flood of applications for habeas corpus throughout the country by persons who had been duly convicted of crime and were serving sentences in state and federal penitentiaries. Since the principle of res judicata was not thought to apply to habeas corpus proceedings, the petitions were presented again and again and to different judges. Need for some sort of corrective legislation was widely felt, and in 1942 the Judicial Conference appointed a committee to inquire into the matter and make report. Appointed on the Committee were Circuit Judge Stone of the Eighth Circuit, Circuit Judge Stephens of the Ninth Circuit, District Judge Vaught of Oklahoma, District Judge Underwood of Georgia, District Judge Wyzanski of Massachusetts, and the undersigned, who was named chairman. A careful study of conditions was made with the aid of the Administrative Office; and after a meeting which lasted several days and in which every phase of the problems presented was carefully discussed with representatives of the Administrative Office and the Department of Justice, the committee made a report proposing that the Conference give its indorsement to two bills which were presented with the report. The bills were carefully gone over by the Conference, and amendments suggested by Chief

Justice Stone and Judge Phillips of the Tenth Circuit were incorporated, and the bills were then indorsed by the Judicial Conference on two separate occasions. The bills as thus indorsed were substantially the bills attached hereto as "Statute A" and "Statute B".

At the request of the Conference the two bills which it had indorsed were introduced in Congress on October 1, 1945, the jurisdictional bill being H. R. 4233 and the procedural bill being H. R. 4232. On June 10, 1946, there was introduced another jurisdictional bill, omitting the provision for a three judge court which had been provided for certain cases and adding a one year statute of limitations. A copy of that bill, marked "Statute X" is sent herewith. At the October 1946 session of the Conference, the Habeas Corpus Committee was directed to give consideration to this "Statute X". The committee reported that the provision for a three judge court should be restored to the jurisdictional bill and the one year statute of limitations eliminated from it. At the same time the committee gave renewed indorsement to the procedural bill, but three members of the committee urged that that bill be changed in ~~one particular.~~

At the session of the Conference on April 21st and 22nd, 1947, consideration was given to the report of the committee, and the committee members present in the Conference acceding in principle to the suggestion of change in the procedural bill made by the three members, the Conference directed that the two bills as thus approved by the committee, with certain stylistic or verbal changes which had been suggested, be sent out for the

consideration of the Federal Judges and Circuit Conferences throughout the country. Your attention is accordingly invited to the proposed "Statute A" and "Statute B" hereto attached, with the request that you advise Mr. Will Shafroth, who is acting as secretary of the Habeas Corpus Committee, of your views with respect to the proposed legislation and of any action taken by any of the Circuit Conferences with respect thereto so that he may bring same to the attention of the committee and the Conference of Senior Circuit Judges.

Reasons for the Proposed Legislation

It was the opinion of the committee that the procedure in ordinary habeas corpus proceedings, such as cases arising in connection with removal, with deportation under the immigration laws or with imprisonment under process or judgment void on the face of the proceedings, was simple and well settled; and that no action, legislative or otherwise, was required with respect thereto. With regard to proceedings brought to secure the release of a petitioner imprisoned under the judgment of a state or federal court, alleged to be void by reason of the disregard of constitutional rights of the petitioner, it was the judgment of the committee that legislation was necessary to secure orderly procedure, to avoid unnecessary and repeated applications to different judges and to minimize the evil of unseemly conflicts between sentencing and hearing courts and between state and federal tribunals.

The present procedure in habeas corpus was adequate so long as the court hearing the applica-

tion was held bound by the record made on the trial of a prisoner theretofore convicted in a state or federal court, not only with respect to questions raised on the trial but also with respect to questions that might have been raised, so that matters dehors the record could be considered only to a very limited extent as affecting the validity of the trial. In recent years, however, decisions of the Supreme Court have greatly enlarged the scope of the inquiry in habeas corpus proceedings by making that remedy available to test the validity of a judgment of a state or federal court attacked on the ground that constitutional rights of the prisoner have been violated. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Johnson* v. *Zerbst*, 304 U. S. 458; *Bowen* v. *Johnston*, 306 U. S. 19, 24; *Waley* v. *Johnston*, 316 U. S. 101, 104. As said in the case last cited:

> The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Bowen* v. *Johnston*, 306 U. S. 19, 24.

In the recent cases of *Carter* v. *People of Illinois* — U. S. —, 67 S. Ct. 216, the Court said:

> The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. *Mooney* v. *Holphan,* 294 U. S. 103. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record.

This review of proceedings in the trial court to determine in an application for habeas corpus, by matters dehors the record, whether conviction of a prisoner has been secured in violation of his constitutional rights, extends to convictions had in state as well as in federal courts. *Smith* v. *O'Grady,* 312 U. S. 329; *Cochran* v. *Kansas,* 316 U. S. 255; *Pyle* v. *Kansas,* 317 U. S. 213; *Sharpe* v. *Buchanan,* 317 U. S. 238; *People* v. *Wilson,* 318 U. S. 688. And when state remedies have been exhausted, habeas corpus proceeding can no longer be dismissed in the federal courts under the doctrine that such remedy will lie in the federal courts only in "rare cases when circumstances of peculiar urgency are shown to exist". See cases last cited. It has been expressly held that habeas corpus will lie where there is allegation that petitioner's imprisonment is in violation of rights guaranteed him by the Constitution and

that his remedies under state law have been exhausted. See *Mitchell* v. *Youell*, 4 Cir. 130 F. 2d 880; *Carey* v. *Brady*, 4 Cir. 125 F. 2d 253; *Gall* v. *Brady*, 39 F. Supp. 504.

Where petitioner is imprisoned under the judgment of a state or federal court, and the conviction is attacked as void on the ground that constitutional rights have been denied on the trial, it necessarily results that the court hearing the application for habeas corpus must review the proceedings of the trial court on matters very largely dehors the record. Under the present practice, no provision is made for the trial judge to supplement the record or even for him to furnish a statement as to what occurred on the trial. On the contrary, if heard at all with respect to the matter, he must be heard as an ordinary witness. *Walker* v. *Johnston*, 312 U. S. 275. This has resulted, in one case at least, in the trial judge of a state court appearing as a witness in a habeas corpus proceeding in a federal court and testifying in defense of the proceedings had in his court. *Mitchell* v. *Youell*, 4 Cir. 130 F. 2d 880. Since state remedies must have been exhausted as a prerequisite to application for the writ, it results in many cases that the federal district court is reviewing on habeas corpus the constitutional validity of a judgment which has been affirmed on appeal by the highest court of a state, and frequently with respect to matters which have been fully considered on that appeal. It is unnecessary to comment on the real danger involved in a procedure which leads so readily to conflict between the state and federal jurisdictions.

While the practice of having criminal proceed-

ings in one federal District Court reviewed and their validity determined in habeas corpus proceedings by another district court is not open to the same objections as where a conflict between state and federal jurisdictions may arise, this is an abuse which should be corrected. It is clear that the question as to the constitutional validity of the trial should be raised in the trial court on motion in the nature of the old writ of error coram nobis, and that habeas corpus in another court to raise such question should not be allowed except in those rare cases where the ends of justice imperatively so require.

Another real evil which has arisen in connection with application for habeas corpus by prisoners under sentence is that there is no limitation under existing law on the number of applications which can be made, and the time of judges is consumed in hearing repeated applications involving identical contentions. Notwithstanding denial of his application, the prisoner, under the present state of the law, has the right to present the same petition to every judge having jurisdiction in the premises. Not infrequently, the same petition is presented, notwithstanding its prior denial, to half dozen or more judges; and each is bound to give it consideration without any regard to the principle of res judicata.

COMMENTS ON STATUTE A, THE JURISDICTIONAL BILL

SECTION 1. It will be observed that the first section of this proposed statute applies only to the case of prisoners in custody under judgments of state courts. The first sentence of the section, which requires that remedies under state law be

exhausted, is merely declaratory of existing law as declared by the Supreme Court; but it is thought wise to include in the statute this important limitation on the right to apply for habeas corpus in the federal courts. The remainder of the first section provides for a court of three judges, where remedies under state law have been exhausted and the application is found to be meritorious. This provision was omitted from "Statute X", but the committee was of opinion that it should be restored.

It is a serious matter to permit a court of the United States to try the proceedings had in a state court and hold them for naught, especially, as is frequently the case, where the proceedings of the state court have been approved and confirmed by the highest court of the state. Such setting aside of state action is certainly no less serious than the setting aside of a state statute or the action of a state administrative board, as to which action by three judges is required. To constitute a court of three judges for the hearing of such matters provides a fact finding court of a standing comparable to that of a Circuit Court of Appeals; and direct review by the Supreme Court obviates delay and gives direct control over the proceedings to the only federal court whose review of state court action has historical basis.

It should not be overlooked in this connection that, as pointed out above, not until recently was it possible for proceedings in a state court to be reviewed by any federal court except the Supreme Court of the Uinted States, where review was by appeal, writ of error or certiorari. The

expansion of the habeas corpus remedy under recent decisions, however, has made it possible for a federal district court to try the proceedings of the state court on matters dehors the record; and cases have arisen in which the judge of a state court and lawyers who participated in a trial before him have been haled into the federal court and examined as witnesses as to the regularity and propriety of the state court proceedings. It is the view of the committee that, when power of this sort is exercised, a court of three judges should be convened to insure, on the one hand, that the power of the state courts shall not be infringed or belittled and, on the other, that prompt relief may be afforded in proper cases.

In order that the courts may not be unduly harassed by the necessity of convening three judges to hear frivolous applications, the bill provides that, if the judge before whom the application is filed, shall determine that no reasonable ground exists for the issuance of the writ, he shall dismiss the petition, and that appeal from this action shall lie to the Circuit Court of Appeals, and not to the Supreme Court. It is believed that most of the groundless petitions with which the courts have been harassed in recent years could be disposed of under this provision, and that only in rare instances would it be necessary to convene a court of three judges. The machinery, however, would always be available to deal with any meritorious case that might arise.

Fear has been expressed that the provision for direct review of the three judge court by the Supreme Court will increase the labors of the latter court; but it is believed that this fear

is not well founded. It will be observed that the review provided is by certiorari; and the Supreme Court by denying the writ can protect itself against reviews which are groundless with no more labor than is involved in considering such applications under the present system. The thought occurs that if this legislation were adopted, the Supreme Court would find in its provisions a solution of the difficulty presented by the increasing number of applications for habeas corpus made to it directly by persons imprisoned under judgments of state courts. With this machinery for the proper hearing of evidence and appraisal of facts, the court might well require that all applications for habeas corpus assailing the validity of state court judgments be handled through it, so that a proper record might be made before the case was brought to hearing in the Supreme Court. This would relieve the Supreme Court of the burden of hearing a multitude of groundless applications and would not impair the power of the Court to exercise original jurisdiction in those rare and exceptional cases which call for its exercise.

Objection is made that convening a court of three judges would impose a burden upon the judiciary of the Circuit; but this burden it is believed will be inconsequential. Only where the district judge decides that the application is meritorious, must he cause a court of three judges to be constituted; and, since the application must show upon its face that remedies under state law have been exhausted, an application which could be held meritorious, i. e., one which the court should entertain, would be very rare.

The committee considered taking away entirely the right of the lower federal courts to review by habeas corpus the proceedings of state courts and to confine this power of review to the Supreme Court of the United States. The Supreme Court, however, is manifestly not willing that its review be confined to the record made in the state court, and the Supreme Court cannot be burdened with the hearing of evidence in this class of cases. A court of three judges to hear the evidence and make a record in those rare cases where all state remedies have been exhausted and there is meritorious petition for relief in the federal court for alleged denial of constitutional rights by state courts, would seem to meet in an appropriate way the problem presented. The machinery thus provided would seldom be used; but, if occasion for its use should arise, it would provide a remedy in keeping with the spirit of our institutions and fitted to deal with the delicate adjustment of state and federal power necessarily involved.

SECTION 2. Section two applies only to prisoners in custody under judgments of federal courts. The first part of the section provides for a motion, in the nature of a writ of error coram nobis, in the court in which the prisoner was convicted, to question the validity of a judgment assailed on the ground that it was entered in violation of prisoner's constitutional rights. It is believed that this part of the section is merely declaratory of existing law. *Holiday* v. *Johnston*, 313 U. S. 342, 349. The last part of the section provides that no application for habeas corpus shall be entertained in behalf of any prisoner entitled to

relief under the motion unless it appears that it is not practicable to determine his rights in that way. The purpose of the section is to require that attacks by a prisoner upon a judgment under which he is held in custody, be made if possible, in the sentencing court and not in the court of the district where he is imprisoned, so as to avoid the unseemly procedure of one district court's being required to try the procedure of another district court upon the mere application of one who has been convicted of crime by the latter. The power to grant relief under habeas corpus where injustice would otherwise result is carefully preserved.

The committee decided that it was neither feasible nor desirable to include in the statute the one year limitation prescribed by section 2 of "Statute X". Habeas corpus can be availed of for the release of one imprisoned under the judgment of a court only if the judgment is void; and if the judgment is void, no time limitation should be asserted against the release of one improperly deprived of his liberty under it. This is true, whether the invalidity of the judgment results from the fact that the court has transcended its jurisdiction, or from the fact that it has lost jurisdiction through disregard of constitutional limitations. Representatives of the Department of Justice, who had originally insisted upon the limitation, withdrew support of it and concurred in the views of the committee.

COMMENTS ON STATUTE B, THE PROCEDURAL PROVISIONS

SECTION 1. Section one makes it discretionary with a Circuit or District Judge whether or not

he will entertain a petition for habeas corpus to inquire into the detention of a person under sentence of a state or federal court, when it appears that the legality of such detention has been determined in a prior application for habeas corpus, no new ground is presented in the present application, and it does not appear that the ends of justice will be served by further inquiry.

SECTION 2. The effect of this section is to permit the filing of a statement by the trial judge as to the facts occurring in the trial, in lieu of requiring that his evidence be taken like that of an ordinary witness.

SECTION 3. The purpose of this section is to facilitate the taking of evidence by permitting the use of affidavits with proper safeguards.

SECTION 4. The purpose of this section is to make admissible evidence taken in prior habeas corpus proceedings.

SECTION 5. The purpose of this section is to relieve petitioner of the binding effect of an untraversed return, which he inadvertently may have failed to deny, and to give to the answer to a notice to show cause the same evidentiary effect as the return to a writ.

SECTIONS 6 and 7. The purpose of these sections is to make readily available to the court material portions of records of conviction, and to enable petitioners to have the benefit thereof without cost.

JOHN J. PARKER,
Chairman, Habeas Corpus Committee.

STATUTE A

A BILL To regulate the review of judgments of conviction in certain criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity under the Constitution, treaties or laws of the United States of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceedings, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. Where a prisoner in custody pursuant to a conviction of a court of any State, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a State court by habeas corpus, writ of error coram nobis, or otherwise, files, or there is filed in his behalf, a petition for writ of habeas corpus before any circuit or district judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue the writ and shall cause a district court of three judges to be constituted in the manner provided by the Act of August 24, 1937, ch. 754, sec. 3, 50 Stat. 752 (28 USC 380a), who shall constitute a court for the hearing of such petition. The decision of such court shall be reviewable by the Supreme Court

of the United States on writ of certiorari. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing it, he shall dismiss the petition from which action an appeal shall lie to the circuit court of appeals for the circuit, upon the filing of the certificate of probable cause required by the Act of March 10, 1908 (ch. 76), entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, as amended" (35 Stat. 40 28 USC 466). The phrase "no adequate remedy" as used in this section means absence of State corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the prisoner.

SECTION 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution, treaties or laws of the United States, or that the court was without jurisdiction, or that the sentence was not authorized by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Unless the court shall determine that the motion on its face presents no ground for the relief sought, it shall thereupon cause notice of the motion to be served upon the United States Attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court

finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his right to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia, and the term "district judge" shall be deemed to include justices of the District Court of the United States for the District of Columbia.

STATUTE B

A BILL To regulate habeas corpus proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge or district court shall be required to entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia, and the term "district judge" shall be deemed to include justices of the District Court of the United States for the District of Columbia.

SECTION 2. On a hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment of any court of the United States or of any State, the certificate of the judge who presided at the trial resulting in the judgment of conviction, setting forth the facts occurring at the trial, shall

be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

SECTION 3. On an application for a writ of habeas corpus, evidence may be taken orally or by deposition, and, in the discretion of the judge, by affidavit. If the evidence is presented in whole or in part by affidavit, any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

SECTION 4. On an application for a writ of habeas corpus documentary evidence and the transcript, if any, of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

SECTION 5. The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceedings, if not traversed, shall be accepted as true except to the extent that the judge shall find from the evidence that they are not true.

SECTION 6. On an application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

SECTION 7. If on any application for a writ of

habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

STATUTE X

A Bill To regulate the review of judgments of conviction in certain criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity, under the Constitution, treaties, or laws of the United States, of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceeding, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. The phrase "no adequate remedy" as used in this section means absence of such State corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the particular petitioner. An appeal shall lie to the circuit court of appeals from an order of discharge or, upon the filing of the certificate required by the Act of March 10, 1908 (ch. 76, 35

Stat. 40, 28 USC 466), from an order denying discharge.

SECTION 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution, treaties, or laws of the United States, or that the court was without jurisdiction, or that the sentence was in excess of the maximum prescribed by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Unless such court shall determine that the motion presents no ground for the relief sought, it shall thereupon cause notice of the motion to be served upon the United States Attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was in excess of the maximum prescribed by law or otherwise open to collateral attack, or that there were errors in the sentence which should be corrected, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the

motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. Any motion under this section shall be filed within one year (a) after the effective date of this Act, or (b) after the discovery by movant of facts upon which he relies for relief, or (c) after any change of law, by statute or controlling decision, occurring subsequent to imposition of sentence and upon which he relies for relief. The burden of establishing that the motion was timely filed shall be upon movant; and failure to file such motion within such time shall bar relief by the writ of habeas corpus unless it appears that it would not have been practicable to determine petitioner's rights to discharge from custody on such motion if the motion had been filed in time. The process of the court wherein such motion is filed may be served at any place within the

jurisdiction of the United States. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

G. REPORT OF THE HABEAS CORPUS COMMITTEE SUBMITTED AT THE REGULAR 1947 SESSION OF THE CONFERENCE

Report to the Judicial Conference of the Committee on Habeas Corpus

To the Chief Justice of the United States and the Judicial Conference of Senior Circuit Judges:

The Committee on Habeas Corpus begs leave to submit the following report.

Pursuant to direction of the Judicial Conference at the special meeting held April 21 and 22, 1947, your Committee sent out to all the Circuit and District Judges of the United States the proposed statutes relating to Habeas Corpus which had been considered by the Conference. The Committee has heard from a large number of judges, practically all of whom approve most of the features of the proposed statutes, but a number of whom expressed themselves as opposed to the provision for a three judge court in certain cases. A number offered constructive suggestions of value. The Judicial Conference of the 1st, 2d, 3d, 5th and 10th Circuits endorsed the proposed legislation. The Conferences of the 7th, 8th and 9th Circuits endorsed it except as to the three judge court provision, which they opposed.

Since the meeting of the Conference in April the House of Representatives has passed H. R. 2055 revising the Judicial Code and this bill is now before the Senate and has been referred to the Senate Judiciary Committee for consideration. Chapter 153 of that codification deals with the subject of habeas corpus and incorporates most of the provisions contained in the proposed statutes considered by the Conference. Your Committee, at a meeting held at Cleveland, Ohio, on Sept. 19th, 1947, at which all members were present, gave consideration to the letters and recommendations which it had received from judges, the action of the various conferences, and the chapter on habeas corpus contained in the proposed revision of the Code. While the various members of your Committee have held somewhat different views on some minor features of the proposed legislation, it has seemed to them so important to secure the passage of legislation along the line proposed that they have thought it wise to abandon further consideration of the statutes heretofore under consideration and join in recommending the adoption of the provisions of the Judicial Code relating to *habeas corpus* with the exception of two sections as to which they submit proposed substitutions as follows:

With respect to Section 2244 of the Revision, your Committee submitted a provision authorizing the denial of subsequent applications for habeas corpus in the discretion of the judge where no new ground was presented and the judge was satisfied that the ends of justice would not be served by further inquiry. This provision was explained

to and approved by the judges of the country and on the basis of their approval your Committee recommended that it be substituted for Sec. 2244 as contained in the Revision. A copy thereof is hereto attached, marked "proposed Section 2244." Judge Stone is of opinion that Section 2244 of the Revision should stand, and that no second petition for habeas corpus to a different federal judge should be allowed unless the petition alleges new grounds of fact or a change in the law since the decision on the first petition.

With respect to Section 2254 of the Revision, your Committee is of opinion that the words "or authority of a state officer", as contained in the section, would unduly hamper federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty, and that the last clause of the section, viz, "or that such courts have denied him a fair adjudication of the legality of his detention under the Constitution and Laws of the United States", should be omitted as adding an undesirable ground for federal jurisdiction in addition to exhaustion of state remedies or lack of adequate remedy in State Courts. Your Committee recommends, in lieu of Section 2254 of the Revision, the Section, copy of which is hereto attached, marked "Proposed Section 2254." It will be noted that the proposed Section uses the language of Section 2254 of the Revision, omitting the language above quoted and adding two sentences the effect of which is to define more specifically what is meant by exhaustion of state remedies and "no adequate remedy available."

Respectfully submitted this 20th day of September 1947.

JOHN J. PARKER, *Chairman.*
KIMBROUGH STONE.
ALBERT LEE STEPHENS.
EDGAR S. VAUGHT.
E. MARVIN UNDERWOOD.
CHAS. E. WYZANSKI, Jr.

PROPOSED SECTION 2244

Finality of Determination

No circuit or district judge or district court shall be required to entertain any application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry. A new ground within the meaning of this section may include a material change in applicable law subsequent to the prior determination.

PROPOSED SECTION 2254

State Custody—Remedies in State Courts

An application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless

it appears that the applicant has exhausted the remedies available in the courts of the state or that there is no adequate remedy available in such courts. An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to file another application for habeas corpus. The phrase "no adequate remedy" as used in this section means absence of state corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the prisoner.

APPENDIX II

THE PRACTICE UNDER § 2255, BASED ON INFORMATION OBTAINED FROM UNITED STATES ATTORNEYS

In an attempt to ascertain the practice in hearing Section 2255 motions, a questionnaire was mailed to the ninety-one United States Attorneys. Sixty-three replies were received in time to be utilized in the preparation of this Appendix. A number of the replies stated either that no cases under Section 2255 had been brought in the district or that all motions filed could be disposed of on the motion and the files and record.

1. *Failure of the Government to produce the movant.*—The first question asked was whether there had been any case in which the Government failed to comply with a court order to produce a prisoner confined outside the district for the hearing on his motion. All replies were negative. In *Payne* v. *United States,* 85 F. Supp. 404 (M. D. Pa.), the court had first "ordered" that "W. H. Hiatt, Warden * * * produce John Robert Payne for said hearing." The order was questioned by the warden. (See Manual of Policies and Procedures for the Administration of the Federal Penal and Correctional Service, Sec. 51.) Thereafter the court issued a writ of habeas corpus *ad prosequendum,* which was honored by the warden. In *United States* v. *Kratz,* 97 F. Supp. 999 (D. Neb.), the court entered an order reciting that there was some doubt as to its power to order

the prisoner produced on writ of habeas corpus, and requesting the U. S. Attorney to make arrangements to have him in court. He was thereupon brought from Leavenworth, Kansas, to Omaha, Nebraska, by order of the Bureau of Prisons.

2. *Process used to produce the movant.*—The second question was as to the nature of the process used where necessary to produce the prisoner from outside the district for a hearing on his motion. A writ in the form of the writ of habeas corpus *ad testificandum* was used in fourteen districts:

N. D. Ala.	S. D. Miss.	W. D. Okla.
W. D. Ark.	D. N. Mex.	D. Utah
S. D. Fla.	E. D. N. Y.	S. D. W. Va.
N. D. Ind.	M. D. N. C.	D. Wyo.
W. D. La.	N. D. Okla.	

Five districts used a writ in the form of a writ of habeas corpus *ad prosequendum:*

S. D. Ga.	N. D. Ohio	N. D. Tex.
D. Kans.	M. D. Pa.	

In one district (N. D. Iowa), both of the above forms of writ have been used. In one district (D. Ore.), while no movants have been produced under Section 2255, the United States Attorney assumes that subpoenas *ad testificandum* or *ad prosequendum* would be appropriate and would be honored.

Some of the United States Attorneys gave information concerning specific cases which is tabulated below:

Case	District	District of confinement	Writ form
Berbette, U. S. v	S. D. Miss	E. D. Tex	ad test.
Cherrie v. *U. S.*, 184 F. 2d 384	D. Wyo	D. Kans	ad test.
Christakos v. *U. S.*	N. D. Ala	Not stated	ad test.
Foster v. *U. S.*, 184 F. 2d 571	S. D. Ga	N. D. Ga	ad pros.
Howard, U. S. v., Cr. 19519 (See 186 F. 2d 778).	N. D. Ohio	D. Kans	ad pros.
Jones v. *U. S.*, 179 F. 2d 303	S. D. W. Va	N. D. Ga	ad test.
Jones, U. S. v., 177 F. 2d 476	N. D. Ind	D. Kans	ad test.
Kline, U. S. v., 98 F. Supp. 325	E. D. N. Y	State institution outside the district.	ad test.
Kratz, U. S. v., 97 F. Supp. 999	D. Neb	D. Kans	Transfer by Bureau of Prisons.
Lavelle, U. S. v	E. D. N. Y	State institution outside the district.	ad test.
Loiseau, U. S. v., Cr. 2160	N. D. Iowa	D. Kans	ad pros.
Long, U. S. v., Cr. 19098	N. D. Ohio	D. Kans	ad pros.
Mandell, U. S. v	N. D. Okla	D. Kans	ad test.
Monti, U. S. v., Cr. 41929	E. D. N. Y	D. Kans	Transfer by Bureau of Prisons.
Myers, U. S. v	N. D. Ind	D. Kans	ad test.
Parker v. *U. S.*, 184 F. 2d 488	M. D. N. C	E. D. Va	ad test.
Payne v. *U. S.*, 85 F. Supp. 404	M. D. Pa	N. D. Ga	ad pros.
Rogers, U. S. v	D. Utah	W. D. Wash	ad test.
Rogers, U. S. v	D. N. M	D. Kans	ad test.
Roland, U. S. v., Cr. 4016	W. D. Ark	Not stated	ad test.
Scoggins, U. S. v., Cr. 438	S. D. Miss	Not stated	Not stated.
Wilson, U. S. v., Cr. 12246	S. D. Ga	N. D. Ga	ad pros.
Ziebert, U. S. v	N. D. Tex	D. Kans	ad pros.

In some cases the language of the writ departs from the traditional forms. Thus, in *United States* v. *Wilson,* Cr. 12246 (S. D. Ga.), the writ, addressed to the warden and the marshal, read in part as follows:

> We demand that you deliver the body of Frank Wilson, * * * for the purpose of having him personally appear * * * in a cause in which the said Frank Wilson seeks to have the judgment and sentence imposed upon him in this court on November 30, 1948, in Indictment No. 12246, vacated * * *.

The writ in *Payne* v. *United States,* 85 F. Supp. 404 (M. D. Pa.), addressed to the warden, read in part as follows:

> You are commanded to produce now, in the custody of Carl H. Fleckenstine, United States Marshal, or one of his deputies, * * * the person of John Robert Payne, whom it is alleged you legally [sic] restrain of his liberty and against whom there are pending certain proceedings * * * to the end that he * * * may be heard upon said pending proceedings * * *.

In *United States* v. *Monti,* Cr. 41929 (E. D. N. Y.), the court ordered—

> that the United States Marshal, * * * or his duly appointed deputies * * * produce the said Martin James Monti, now confined in the United States Penitentiary at Leavenworth, Kansas * * * for the purpose of testifying as to the aforesaid matter * * * on condition, however, that the traveling and lodging expenses of said defendant and of the said United States Marshal or his deputies shall be borne solely by said defendant * * *

Later the prisoner was, by order of the Bureau of Prisons, transferred at government expense to a federal institution in Brooklyn, N. Y., in order to be available at the hearing on his motion. Hearings in open court were had at various times between June 21, 1951 and July 27, 1951 at which the movant testified at great length.

3. *Nature of the hearing on the motion.*—The United States Attorneys were also asked to summarize the procedure followed where a Section 2255 motion raises issues of fact which cannot be

conclusively resolved from the files and records of the case.

Thirty-three replies give some indication of the procedure followed, and are summarized below.

N. D. Ala.:

Movant's presence ordered in only factual case, *Christakos* v. *U. S.*

W. D. Ark.:

In the only case which could not be resolved from files and records, an attorney was appointed and given adequate opportunity to confer with the movant. The movant testified at the hearing. A perjury case is now pending against the movant growing out of allegedly false testimony at the hearing.

S. D. Ga.:

Counsel was appointed by the court in at least one case. Movant's presence ordered in *Foster* v. *United States,* 184 F. 2d 571; and *U. S.* v. *Wilson,* Cr. 12246. It was not ordered in *U. S.* v. *Van Buren,* Cr. 324—the court entered findings that movant's contentions had been determined adversely to him by the jury at his criminal trial.

N. D. Ind.:

The movant's presence was ordered in *U. S.* v. *Jones,* 177 F. 2d 476.

S. D. Ind.:

The court has allowed affidavits, testimony by witnesses from both sides (other than the movant), appointment of counsel and adequate opportunity to confer "at least through correspondence." The movant has not been produced. The United States Attorney notes that the proper pro-

cedure under Section 2255 "was one of the main topics of discussion at the most recent Judicial Conference" for the Seventh Circuit.

N. D. Iowa:

Movant is given notice of the hearing and opportunity to confer with counsel, and is present at the hearing in open court. If he has no counsel he is informed of his right to counsel and counsel is appointed if desired.

E. D. La.:

Counsel is appointed, and movant is notified of the date of the hearing. Letters have been considered "in the nature of depositions." Counsel presented movant's views as expressed by correspondence but movant has not been produced in any case to date.

W. D. La.:

The movant has been present in all factual cases. Counsel is appointed and testimony taken in open court. Adequate time between arrival of movant and hearing is allowed for preparation by his counsel.

D. Minn.:

In the only factual case, *De Jordan* v. *United States,* 187 F. 2d 263, counsel was appointed, transcripts of two habeas corpus proceedings at which movant had testified were received in evidence, other testimony was taken, the prisoner was not produced.

S. D. Miss.:

Apparently the movant has been allowed to be present in some but not in all factual cases. Some cases have been decided on affidavits;

complete hearings have been held in others. Counsel has been appointed on some occasions.

E. D. Mo.:

The court usually appoints counsel if requested, and in some cases where not requested. All cases have been disposed of by the United States offering oral testimony at the hearing to establish its version of controversial facts disclosed in the movant's affidavit. The movant's presence has not been ordered in any case.

D. Neb.:

In *United States* v. *Kratz,* 97 F. Supp. 999, the prisoner was produced (See pp. 187–188, *supra*). Several days prior to the hearing, he appeared in court to request that counsel be appointed for him, which was done. He testified at the hearing.

D. N. M.:

In one case a full hearing was held with movant present. Testimony from both sides was received. In another case trial counsel for movant was directed to appear, and the court after inspection of the record and hearing statements of trial counsel denied the motion without ordering the movant's presence.

E. D. N. Y.:

In three cases the movant was produced. *U. S.* v. *Lavelle* (unreported); *U. S.* v. *Kline,* 98 F. Supp. 325; *U. S.* v. *Monti* (not yet reported). In the *Lavelle* and *Kline* cases counsel was appointed; *Monti* had retained counsel. In *U. S.* v. *Freundt* retained counsel agreed that production of the movant was unnecessary in view of the voluminous affidavits submitted. In *U. S.* v.

Donay, counsel was assigned and requested that the prisoner be produced from Atlanta. The request was denied and the motion decided on voluminous affidavits and the testimony of the movant's trial counsel.

N. D. N. Y.:

No cases involving prisoners confined outside the district. In one case, *U. S.* v. *Benninger,* Cr. 28743, the movant was produced from within the district on writ *ad testificandum,* but at the hearing informed the court that he did not desire to testify.

S. D. N. Y.:

In every case the motion has been disposed of on supporting and opposing affidavits without production of the prisoner.

E. D. N. C.:

There have been only two factual cases; both involved contentions that a guilty plea was not authorized by the movant. The movant was not present at the hearing. The court examined the record which showed that the trial court had interrogated the movant before sentencing. Trial counsel were interrogated under oath. No notice was given to the movant nor was counsel provided.

M. D. N. C.:

The movant is notified and served with the reply of the Government, and in most cases has his trial counsel or court appointed counsel present. He was allowed to be present at the hearing in one case, but not in others. Government witnesses are examined and cross-examined to disprove the movant's contentions. "In most

cases prisoners have not asked to be present and have not asked to be represented."

W. D. N. C.:

The movant is advised of the hearing, his right to counsel and the right to file affidavits. In no case has his presence been ordered. The Government ordinarily uses only the record or affidavits.

N. D. Ohio:

Movant's presence was ordered in the only two factual cases, *U. S.* v. *Howard,* Cr. 19519 (see 186 F. 2d 778), and *U. S.* v. *Long,* Cr. 19398.

N. D. Okla.:

Movant has been allowed to be present where factual issues were raised. Testimony is taken in open court.

W. D. Okla.:

Movant has been produced in all cases where a factual issue was raised. Counsel is provided and given adequate time to prepare and to confer with movant.

D. Ore.:

In the only case where factual issues were tried before the court, *U. S.* v. *Pillsbury,* Cr. 15132, the issue was whether the trial judge and the U. S. Attorney had made prejudicial remarks before the jury. Testimony of the prosecutor, trial judge, defense counsel and jury foreman was taken. Movant was advised of the hearing, and counsel appointed. Movant was not present at the hearing, but a copy of the transcript of the hearing was forwarded to the movant. In other cases the court has appointed counsel to investigate

the allegations of the movant which were found to be without merit.

M. D. Pa.:

The movant's presence was ordered in at least one case.

W. D. Pa.:

In the only factual case, *U. S.* v. *Gallagher,* 94 F. Supp. 640, the question arose as to the true name of the movant who had been tried for transporting a falsely made check. The court asked the F. B. I. to investigate and decided the factual issue, in the movant's favor, on the basis of the report, without ordering the movant's presence. See 94 F. Supp. 640.

D. Puerto Rico:

All cases have been disposed of on files and records. In some, counsel has been appointed and a hearing had, apparently confined to issues of law. The movant has not been produced in any case.

E. D. S. C.:

In the only factual case the movant claimed his guilty plea was coerced. The court decided the issue on the basis of the motion and the officer's affidavit denying coercion. The movant was not produced. It does not appear whether the affidavit was served on him.

N. D. Tex.:

The movant was produced in the only factual case after order from the Fifth Circuit to hold a hearing with movant present. *U. S.* v. *Ziebert* (unreported).

D. Utah:

In the only factual case, *U. S.* v. *Rogers,* the movant asserted that a coerced confession had been

used. He was produced a month in advance of the hearing and given ample opportunity to consult with two court appointed attorneys. Witnesses testified for the Government and were cross-examined. The movant was given an opportunity to testify and to call witnesses. Argument was heard.

E. D., Wash.:

In the only case, *Nemoc* v. *U. S.*, the court heard the testimony on a written brief and letters from the movant who was not brought before the court. Denial of the motion was affirmed by C. A. 9, Sept. 5, 1951.

S. D. W. Va.:

"Where the issues raised can be resolved from the file and record" the court appoints counsel and hears the matter without the prisoner being present. The movant's presence was ordered in, at least one case, *Jones* v. *U. S.*, 179 F. 2d 303.

E. D. Wisc.:

In the only case presenting factual issues the movant was notified of the hearing and counsel was appointed and given adequate opportunity to confer by correspondence with the movant. The movant was not present at the hearing. Copies of the transcript were made for the movant.

D. Wyo.:

In one case, presence of movant was ordered and counsel was appointed by the court. *Cherrie* v. *United States*, 184 F. 2d 384.

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